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Docket No.: _____

IN THE UNITED STATES SUPREME COURT
Filed in 1997 October Term

PAUL E. MANOR and LYNETTE MANOR,
husband and wife,
Petitioners,

v.

NESTLE FOOD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington [Docket No. 63133-6]

AMENDED APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT STATE OF WASHINGTON
Date: MAR 13 1997
/s/ Durham CJ
CHIEF JUSTICE

SUPREME COURT OF THE STATE OF WASHINGTON

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Respondents,	)	No. 63133-6
V.	)	EN BANC
NESTLE FOOD COMPANY, Petitioner.	)	Filed MAR 13 1997

TALMADGE, J. -- Nestle Food Company (Nestle), a self-insured employer, paid more than $455,000 in medical and time-loss benefits to Paul Manor for a workplace injury he sustained. Now Manor wants to sue Nestle for the same injury. He asserts WAC 296-15-023(2), which declares Nestle to be Manor's employer, is invalid. Employing the standard of review set forth in our State's Administrative Procedure Act (APA), we hold the regulation is valid, and Nestle is therefore immune to suit by Manor under the exclusive remedy provision of the Industrial Insurance Act (IIA).

ISSUES

1. Does WAC 296-15-023(2) make Nestle Manor's employer for purposes of the Industrial Insurance Act?

2. Is WAC 296-15-023(2) valid under RCW 34.05.570(2)?

FACTS

On January 15, 1992, while working as a truck driver for Carnaco Transport, Inc. (Carnaco), Paul Manor went to the Carnation processed potato plant in Othello, Washington, to pick up a load. While at the plant, a forklift ran over Manor's foot. As a result of the industrial injury, Manor developed Guillain-Barre syndrome and became paralyzed. He finally was able to leave the hospital in November 1992, but required additional care at home.

The Carnation Company (Carnation) became a self-insurer under the IIA for itself and its various subsidiaries in 1979. Carnaco was a subsidiary of Carnation and maintained facilities in Moses Lake. Carnation also owned the processed potato plant in Othello, Washington, where Manor was injured. From 1979 forward, Carnation treated all of its employees, including those at the processed potato plant in Othello and its Carnaco employees, as employees under its certificate of self-insurance with the Department of Labor & Industries (Department). In 1985, Carnation became a wholly-owned subsidiary of Nestle Holdings, Inc., and its name was eventually changed to Nestle Food Company.[1]

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[1] There is no indication in the record of manipulation of the corporate form by Carnation or Nestle to avoid actions by employees. Rather, Carnation, and then Nestle, continuously treated employees of its transportation subsidiary and its own employees as the same employees under its certificate of self-insurance.

Manor filed a claim with Carnaco for industrial insurance benefits, listing Carnaco as his employer. The Department allowed the claim by order of February 14, 1992. Manor did not appeal the order. Ultimately, Nestle paid Manor medical benefits of $437,187.02, and time-loss benefits of $18,646.66.

Manor filed a personal injury action against Nestle in April 1993. He alleged Nestle was liable for its own negligence and, under the principle of respondeat superior, for the negligence of the forklift operator who ran over his foot. Nestle argued it was immune under Title 51 RCW because the forklift operator was Manor's fellow employee.

Nestle moved for dismissal. Manor argued, under the common law, the forklift operator was not a fellow Nestle employee. The trial court granted the motion to dismiss because Manor's injury was caused by a fellow employee and Nestle was immune under the IIA. The trial court also held the designation of Nestle as Manor's employer in the Department's February 14, 1992 order had preclusive effect.

Manor appealed and the Court of Appeals reversed, holding a self-insured parent corporation is not, as a matter of law, the employer of employees working for a subsidiary, and material issues of fact remained as to whether Nestle should be considered Manor's employer. The Court of Appeals also disagreed with the trial court on the preclusive effect of the Department's decision. *Manor v. Nestle Food Co.*, 78 Wn.App. 5, 895 P.2d 27 (1995). We granted review.

ANALYSIS

An employer may comply with the requirements of the IIA either by insuring with the State Industrial Insurance Fund or qualifying as a self-insurer under Title 51 RCW. Self-insurers must pay the claims of their injured workers.

Therefore, self-insurers obtain the same immunity from actions by employees as state fund employers. RCW 51.04.010 (exclusive remedy provision); RCW 51.32.010. Although an injured worker may not sue his or her employer for a workplace injury, RCW 51.24.030(1) authorizes suit against a third person at fault for the worker's injury, provided the third person is not in the worker's same employ.

The central issue in this case is whether Manor and the forklift operator who ran over his foot were "in the same employ" for purposes of RCW 51.24.030(l). The dispositive regulation is WAC 296-15-023(2). Promulgated under the Department's authority to regulate self-insurers, WAC 296-15-023(2) states: "One certificate will be issued to an approved self-insurer, including all subsidiaries or divisions. *The entities will be considered as one employer for all purposes of Title 51 RCW."* (Emphasis added.) This regulation addresses and cures a serious coverage problem under the Act. In the absence of a mandate that an employer include all of its subsidiaries or divisions within its certificate of self-insurance, the self-insured employer could structure its business so that it was self-insured for employees in its low risk activities, while employees in its high risk activities were covered by the state fund, skewing the cost to employers in the state fund. WAC 296-15-023(2) makes Manor and the forklift operator employees of the same self-insured employer, Nestle. However, the Court of Appeals held the regulation invalid.

A. Standard for Judicial Review of an Agency Regulation

WAC 296-15-023(2) provides that Nestle is to be treated as an employer for all purposes under Title 51.

While this is a regulation and not a statute, "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979); "[a] legislative rule has the force and effect of law, if promulgated in accordance with a legislative delegation." 2 AM. JUR. 2D, *Administrative Law* § 160, at 182 (1994).

The Court of Appeals, in holding the regulation invalid, gave it short shrift, deciding it is "not reasonably consistent" with its enabling legislation because "[it] may result in the denial of a worker's right to bring a third-party claim against the parent company of his employer merely because the parent chose to self-insure." *Manor*, 78 Wn.App. at 10. The Court of Appeals did not further first articulate how WAC 296-15-023, first promulgated in 1983 and unaltered by legislative amendment since then,[2] was somehow an irrational or aberrational exercise of delegated legislative authority. The Court of Appeals simply concluded the regulation is invalid without reference to the APA standard for judicial review of the validity of an agency regulation, or to our leading decision interpreting that APA standard.

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[2] The legislature's failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency's interpretation of the statute. This is especially true when the legislature has amended the statute in other respects without repudiating the administrative construction. *Green River Community College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 118, 622 P.2d 826 (1980), *modified*, 95 Wn.2d 962, 633 P.2d 1324 (1981); *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 371-72, 274 P.2d 852 (1954).

A proper APA analysis reveals no reason to invalidate WAC 296-15-023(2).[3]

The legislature enacted the APA in 1988, Laws of 1988, ch. 288, and added "a new criterion which significantly expands the review process." *Neah Bay Chamber of Commerce v. Department of Fisheries*, 119 Wn. 2d 464, 469, 832 P.2d 1310 (1992). The Legislature set forth the standard of review for agency regulations in RCW 34.05.570(2)(c):

> In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

This Court extensively analyzed and interpreted the new statute in *Neah Bay*. There, we considered the former version of the statute, which differed significantly only in the last phrase, "could not conceivably have been the product of a rational decision-maker," a phrase now replaced by "arbitrary and capricious." We held:

> In sum, the "product of a rational decision-maker" standard adopted by the Legislature at RCW 34.05.570(2)(c) involves an inquiry into the reasonableness of regulations analogous to the

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[3] Similarly, the dissent neglects to undertake the analysis of the regulation required by the APA and our case law. The central flaw in the dissent's treatment of the regulation is its failure to address how WAC 296-15-023 was violative of RCW 34.05.570(2)(c) in any respect.

> application of the arbitrary and capricious standard. To decide if a regulation should be overturned because it could not conceivably be the product of a rational decision-maker, we hold that the proper analysis is the 3-part test suggested by amicus, Professor Andersen, and utilized by the federal courts. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 77 L.Ed. 2d 443, 103 S.Ct. 2856 (1983). The court's task is to determine if a given regulation is reasonable without substituting this court's judgment for that of the agency. First, the court inquires if the agency's explanation of its own rule is clear. Second, the court must ask if the agency utilized the appropriate statutory framework, whether it used correct factors in deciding the rule, and if it avoided improper factors. Third, the court must decide if a decision-maker could have reached the conclusion reached by the agency (taking the foregoing into account) by some reasonable process.
>
> This analysis requires the court to review the administrative record to determine the factors employed by the agency and the quality of its reasoning. The court must scrutinize the record to determine if the result was reached through a process of reason, not whether the result was itself reasonable in the judgment of the court.

Neah Bay, 119 Wn.2d at 473. The Court thus equated the "product of a rational decision-maker" standard with the "arbitrary and capricious" standard. The Legislature later acquiesced in this

interpretation in 1995 when it changed the language of the final phrase to "arbitrary and capricious." Laws of 1995, ch. 403, § 802. See 1995 Final Legislative Report, EHSB 1010, at 7 (February 1, 1995) ("The current 'conceivably the product of a rational decision maker' standard of review is changed to 'arbitrary and capricious'").

B. Analysis of WAC 296-15-023(2) Under the Statutory Standard of Review

RCW 34.05.570(l) places the burden of demonstrating the invalidity of a rule on the party asserting invalidity. Although Manor did not undertake this responsibility, the following analysis, mandated by RCW 34.05.570(2)(c), demonstrates the rule is valid.

1. Does the Rule Violate Constitutional Provisions? The Court of Appeals found WAC 296-15-023 appropriate in all respects, except the phrase treating the self-insurer as a single employer for all Title 51 RCW purposes, including immunity. The Court of Appeals held the regulation is inconsistent with the IIA to the extent it requires parent companies to be treated as employers for all purposes, because doing so would deprive the worker of the right to bring a third-party suit against a parent merely because the parent chose to self-insure. The Court of Appeals based this conclusion on the ostensibly disparate treatment between employees of self-insured employers and employees of state fund employers, citing *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 630 P.2d 441 (1981).

Johnson was an equal protection case under article I, section 12 of the Washington Constitution. The issue there was whether a worker who prevails on appeal of a decision of the Board of Industrial Insurance Appeals is entitled to an award of reasonable attorney fees.

[8 - 10]

At the time, RCW 51.52.130 permitted recovery of attorney fees only if the accident fund was affected by the litigation. This provision excluded workers of self-insured employers from receiving attorney fees under the same facts that would entitle a worker of a state fund insured employer to fees. In holding the successful plaintiffs were entitled to costs and attorney fees under the statute, the Court said:

> It is a manifest injustice of the most egregious nature, and we hold it to be a violation of the equal protection clause of the Fourteenth Amendment and Const. art. 1, § 12 to classify one group of employees so that they receive fewer benefits than similarly situated employees simply because the employer chooses to be self-insured.

Johnson, 95 Wn.2d at 745.

Today, we apply the rational basis test to evaluate equal protection claims: "Under the rational basis test, a legislative classification will be upheld 'unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.' . . . The burden is on the party challenging the classification to show that it is 'purely arbitrary.'" *State v. Cozia*, 120 Wn.2d 156, 171-72, 839 P.2d 890 (1992), quoting *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990). Applying the rational basis test, we find no equal protection infirmity in the regulation before us.

The Court of Appeals expressed concern that a decision for Nestle would deprive a worker of the "right" to bring a third-party lawsuit solely because the parent is self-insured, labeling that result somehow antithetical to the equal treatment to be afforded workers under the IIA. We disagree. There are at least three answers to the Court of Appeals' concern.

First, the true victim of an equal protection violation under the Court of Appeals holding would be self-insured, statutory employers like Nestle. WAC 296-15-023(2) makes a self-insuring, parent company like Nestle responsible to compensate injured employees of its subsidiaries. The Act contemplates, and WAC 296-15-023(2) makes express, that an employer seeking self-insured status must decide either to have *all* of its subsidiaries or divisions self-insured, or *all* of its subsidiaries or divisions covered by the state fund. As Nestle is financially responsible for compensation to injured workers, so should it be immune from suit by injured workers. To hold otherwise would deny Nestle the immunity from suit the grants to all employers -- a result without logic or justice.[4]

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[4] In a similar situation, we found "grave constitutional questions" arose from a comparable assertion. *Epperly v. City of Seattle*, 65 Wn.2d 777, 779 n.1, 399 P.2d 591 (1965) (plaintiff injured at job site, who was employee of contractor, sought to sue owner of property who paid industrial insurance premium). We said:

> We are impressed, as was the trial court [which rejected the lawsuit against the owner], with the incongruous result necessarily flowing from the plaintiffs theory under which the owner of the premises who either directly or indirectly pays the insurance premium based on the hazards of his undertaking gets no protection from the employees of the contractor who may be injured in the course of the work for which the premiums are paid. The construction of the statute to permit such a result presents grave constitutional questions which have not been adequately argued.

Here, Nestle compensated Manor for his injury, as the law required it to do. By fulfilling its obligations to Manor under Title 51, Nestle should, a fortiori, be entitled to its side of the quid pro quo central to the entire workers' compensation statutory design: it should be immune from suit by Manor. In the words of the late Professor Larson, "immunity follows compensation responsibility." 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 72.33, at 14-290.3 (1993).

Second, Professor Larson writes: "When compensable injury is the result of a third person's tortious conduct, all statutes preserve a right of action against the tortfeasor, since the compensation system was not designed to extend immunity to strangers." LARSON, *supra*, § 71.00, at 14-1 (1993). Here, Nestle is hardly a third party to Manor in the ordinary sense of being a "stranger to the transaction." Nestle insured Manor. Nestle paid Manor $455,000 in medical and time-loss benefits. Rather than crediting these salient facts, the Court of Appeals took the hypertechnical view that if Nestle is not the common law employer of Manor, must of necessity be a third party and

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Epperly, 65 Wn.2d at 779 n.1. The Court decided the case on other grounds. Although the Court did not elaborate on the nature of the 'grave constitutional questions" presented, the owner had suggested in its brief to the Court that requiring the party who paid the insurance premium also to be liable to suit by the contractor's injured employee, thereby depriving that party of the benefit of insurance would unconstitutionally deprive the party of property without due process of law. Br. of Resp't in *Epperly* at 30. Violation of equal protection is probably the better constitutional argument.

therefore not immune from suit by Manor.[5]

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[5] The IIA does not define a person as a "worker" or "employer" under Title 51 RCW solely by the common law test of master-servant. We have said "that the common-law rules, *except as modified by statute*, apply in determining whether the relationship of employer and employee exists." *D'Amico v. Conguista*, 24 Wn.2d 674, 680, 167 P.2d 157 (1946) (emphasis added); *Clausen v. Department of Labor & Indus.*, 15 Wn.2d 62, 69, 129 P.2d 777 (1942). Thus, the Legislature is not bound by, and may choose to expand or contract, the common law definitions of "employer" and "employee" for purposes of coverage under Title 51.

Title 51 is replete with instances where common law principles of the employer-employee relationship are "modified by statute" to include or exclude workers from the purview of the IIA. For example, the most significant departure from common law principles in the IIA is the provision affording coverage to independent contractors, the essence of whose contract is personal labor. RCW 51.08.070(l). General contractors are responsible for paying the premiums of employees of subcontractors, except for certain exclusions, even though the general contractor is not their common law employer. RCW 51.12.070. Such general contractors may be considered statutory employers, as they would not be considered common law employers in the ordinary course. RCW 51.12.035 provides "[v]olunteers shall be deemed employees and/or workers, as the case may be, for all purposes relating to medical aid benefits under chapter 51.36 RCW." RCW 51.12.045 provides workers' compensation coverage for offenders performing community service pursuant to court order. Likewise, RCW 51.12.020 excludes from Title 51 coverage several categories of workers who might ordinarily be employees under common law principles, including domestic workers, gardeners and maintenance workers at a private home, jockeys, and musicians. *See also* 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 49.00 (1993) (enumerating statutory employees under the various state worker compensation acts).

Our courts have many times in the past looked to the overall purpose and policy of the IIA to avoid such hypertechnical readings. For example, in *Corr v. Willamette Indus.*, Inc., 105 Wn.2d 217, 713 P.2d 92 (1986), we held the plaintiff, an employee of the defendant's wholly owned subsidiary, did not state a claim against the defendant for injuries arising out of an industrial accident because the defendant was the plaintiff's employer. *See also Wolf v. Scott Wetzel Services, Inc.*, 3 Wn.2d 665, 782 P.2d 203 (1989) (claims administrator entitled to immunity under IIA); *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980) (Department safety inspectors not third persons under the IIA); *Deeter v. Safeway Stores, Inc.*, 50 Wn.App. 67, 747 P.2d 4103 (1987) (claims administrator entitled to immunity under IIA because it was acting as agent of employer), *review denied*, 110 Wn.2d 1016 (1988). In *Wolf*, 113 Wn.2d at 676-77, we referenced with favor Judge Grosse's concurring opinion in

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In similar fashion, to further the ends of the IIA, this Court has gone beyond the constraints of the common law employer-employee relationship to find coverage under the Act. *See. e.g., Bolin v. Kitsap County*, 114 Wn.2d 70, 785 P.2d 805 (1990) (jurors covered under RCW Title 51 although they were not common law servants and never consented to an "employment" relationship with counties; their service was, in fact, involuntary).

The dissent's recitation of cases and authorities from other jurisdictions on the question of whether a corporate parent is entitled to the immunity of its subsidiary is interesting, but not pertinent to this case. Dissent at 8-9. As noted above, the Legislature has frequently departed from the traditional common law employer-employee relationship in deciding coverage under the Act. Moreover, the dissent fails to show how WAC 296-15-023 is beyond the authority of the Legislature or the Department, as the Legislature and Department are not bound by the common law employer-employee relationship.

Deeter, where he wrote:

> The relationship of the employee, the employer, and the claims adjuster for the employer with respect to a claim for delay in payment which involves a dispute over the right to, or amount of, compensation flows from the rights and obligations created by the IIA, not from any independent source. To permit a right of action against the claims adjuster merely because it is a "third party" would vitiate the policy of the IIA.

Deeter, 50 Wn.App. at 83-84 (Grosse, J., concurring). Here, the IIA creates Nestle's obligations to Manor. The Act makes Nestle responsible for Manor's injury compensation. Having fulfilled its obligation under the IIA to provide Manor "sure and certain relief," Nestle is correspondingly entitled to immunity from "all civil actions and causes of action" stemming from Manor's injury. RCW 51.040.010 (declaring purpose of IIA and abolishing jurisdiction of courts).

Third, the Court of Appeals asserts workers must receive equal treatment under the IIA in every case, and that equal protection concerns arise when workers do not receive equal treatment. This is an overstatement. The IIA treats employees of self-insured employers differently from employees of state fund-insured employers in several ways.

For example, the employees of self-insured employers need not pay one half of the cost of the medical aid fund, as do the employees of state fund employers. RCW 51.16.140(1). It is a gross misdemeanor for self-insurers to obtain or even attempt to obtain a comparable contribution from their employees. RCW 51.16.140(2). Employees of self-insured employers have the right to a penalty against their employers for delay or refusal to pay benefits. RCW 51.48.017.

The existence of such a penalty provision obviously gives employees leverage in bargaining for benefits with their self-insured employer. RCW 51.32.190 details claim processing procedures applicable only to self-insurers. These distinctions in treatment indicate, contrary to the Court of Appeals implication, there is no requirement in the IIA for precisely similar treatment of employees of self-insureds and state fund employers, and there is nothing inherently improper about dissimilar treatment.

Rather, the pivotal equal protection inquiry in this case is whether WAC 296-15-023(2) passes the rational basis test. There is plainly nothing arbitrary about WAC 296-15-023(2). It achieves a legitimate state objective by creating statutory employers to ensure subsidiary corporations meet their industrial insurance premium obligations. In return, it grants those statutory employers immunity from suit by injured workers. The regulation is simply an accurate reflection of the "grand compromise" of the IIA. Indeed, to deny immunity to Nestle, a *statutory* employer, would violate its right to equal protection compared to similarly situated *common law* employers, who would be immune from suit by Manor under the same circumstances.[6]

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[6] The dissent's contention that Manor would be treated differently if he were an employee of a firm covered by the State Fund is not necessarily even accurate. Dissent at 7. The Department's regulations provide that the general rule for classification of employees in businesses covered by the State Fund is to cover all employees of an enterprise within a single risk classification just as WAC 296-15-023 does for employees of self-insured employers and their subsidiaries. WAC 296-17-380. See also WAC 296-17-390 (business with multiple enterprises in state); WAC 296-17-420 (certain transportation, warehousing, and shipping services as general inclusions for coverage); WAC 296-17-87306 (in calculating a business' claims experience, claims experience of subsidiaries are included).

WAC 296-15-023(2) does not violate equal protection principles. The rule passes the first statutory test.

2. Does the Rule Exceed the Statutory Authority of the Agency? The Department is generally authorized to promulgate regulations governing the administration of Title 51 RCW, RCW 51.04.020(1), as well as rules for self insured employers specifically. RCW 51.14.020(7). The rule at issue here, by mandating that Nestle be treated as an employer for all purposes of Title 51, is within the bounces of the authorizing statute. The key provision of the IIA, immunizing employers from suits by injured workers in return for swift and sure compensation, is precisely what WAC 296-15-023(2) implements in this case. it is plainly within the authority of the Department to designate which entities shall be considered employers for the purposes of Title 51. Obviously, such determinations are limited to the purview of Title 51, and do not and cannot affect the common law or other statutory law governing parents and subsidiaries or employers and employees. The rule passes the second statutory test.

3. Was the Rule Adopted Without Compliance With Statutory Rule-Making Procedures? Neither party makes such a claim, and there is nothing in the record to support such a claim. The rule passes the third statutory test.

4. Is the Rule Arbitrary and Capricious? The fourth test requires the most analysis: "The court's task is to determine if a given regulation is reasonable without substituting this court's judgment for that of the agency." *Neah Bay*,119 Wn.2d at 473-74. A three-part test applies:

> First, the court inquires if the agency's explanation of its own rule is clear. Second, the

> court must ask if the agency utilized the appropriate statutory framework, whether it used correct factors in deciding the rule, and if it avoided improper factors. Third, the court must decide if a decision-maker could have reached the conclusion reached by the agency (taking the foregoing into account) by some reasonable process.

Id. at 473-74. No agency explanation of the rule appears in the record, so we are unable to make the first inquiry. The following analysis demonstrates, however, the regulation meets all the remaining requirements of the test.

WAC 296-15-023 is a rational approach to the problem of self-insured businesses' spinning a risky portion of their enterprise off to state fund coverage, and ensuring that corporate parents bear complete responsibility for the coverage of the workers of the parent and any of its subsidiaries. The rule is designed to ensure, with the changes in status of employers through merger, consolidation, combination, and otherwise, employees will not have to guess who their employer is for purposes of the IIA, and employees will receive the statutorily-mandated coverage.

Before an employer is certified as a self-insurer, the employer must identify the name and location of each of its businesses. RCW 51.14.030(5)(e). Pursuant to its general rulemaking authority, the Department adopted WAC 296-15-023(1), which provides the certification of a firm as a self-insurer "will include all of its subsidiaries or divisions doing business in the state of Washington." Subsection (2) of that rule states that only one certificate will be issued to an approved self-insurer, "including all subsidiaries or divisions," and "[t]he entities will be considered as one employer *for all purposes of Title 51 RCW.*" (Emphasis added.) *See* RCW 51.04.120; WAC 296-17-380;

WAC 296-17-390; WAC 296-17-87306 (providing analogous requirements for insuring State fund employers with multiple enterprises or subsidiaries).

To put the rule in appropriate context, the Department has evidenced an unambiguous intent to prevent self-insured corporate parents from evading industrial insurance coverage for employees of subsidiaries. In addition to the mandate of WAC 296-15-023, a self-insurer may not cease business, change its corporate organization, or sell parts of itself without notifying the Department and assuming liability for all claims during the self-insured period for the separated part of the business. WAC 296-15-170. Most significant, a self-insured parent corporation *guarantees* the payment of benefits to employees of its subsidiaries:

> If an applicant for self-insurance certification is a subsidiary, the parent firm shall furnish the department with its guarantee to assume and be responsible for the workers' compensation liabilities of the subsidiary in the event the subsidiary firm is unable or unwilling to cover these liabilities. If a self-insurer is purchased by another firm, which becomes its parent, the parent shall provide the department with its most recent audited financial statement and its guarantee.

WAC 296-15-022. In effect, the parent agrees to stand in the shoes of the subsidiary corporation for the subsidiary's industrial insurance obligation to its workers, if the subsidiary cannot perform.

In conclusion, ample reasonable bases exist to support the regulation. The regulation is valid. Nestle paid Manor compensation for his injuries. This Court has "consistently held that when an employer . . . pays its industrial insurance premiums

pursuant to the Act the employer may no longer be looked to for recourse." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 241, 588 P.2d 1308 (1978). We should not now disregard this fundamental tenet of the IIA.[7]

CONCLUSION

Carnation, and later Nestle, complied with the requirements of self-insurance under Title 51 RCW. They paid the appropriate premiums and complied with the requirements of statute and regulation that self-insurance cover all employees of the parent corporation and its subsidiaries. Thus, Carnation, and later Nestle, were Manor's employer for purposes of the IIA. Nestle here paid more than $455,000 in industrial insurance benefits to the injured worker in accordance with the terms of Title 51 RCW. Having done so, Nestle is entitled to the immunity from suit afforded by RCW 51.04.010.

The decision of the Court of Appeals is reversed. We remand this case to the Adams County Superior Court for entry of an order consistent with this opinion.

/s/ Talmadge, J.

WE CONCUR:

/s/ Durham, C.J. /s/ Dolliver, J. /s/ Smith, J.

/s/ Guy, J. /s/ Johnson, J.

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[7] Nestle also argues the Department's order stating it was Manor's employer has preclusive effect, citing *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994). In light of our disposition of the principal issue in this case, we do not reach this issue.

Manor v. Nestle Food Co.
Majority by Talmadge, J.
Dissent by Madsen, J.

No. 63133-6

MADSEN, J. (dissenting) - The Industrial Insurance Act (IIA) grants the worker the valuable right to bring third party actions. There is no sound basis for denying Mr. Manor that right.

Nothing in Title RCW 51 provides that a self-insured corporate parent of a subsidiary is the "employer" of the worker. There is nothing in the history of the self insurance statutes showing that the Legislature intended when enacting the self-insurance provisions that a self-insuring corporate parent be considered the "employer" of a subsidiary's worker. Nothing in the quid pro quo compromise underlying the workers' compensation contemplated the rise of today's modern corporate structures, and nothing about that compromise dictates that the corporate parent must be considered the "employer." The purpose of WAC 296-15-023(2)'s provision that the entities covered under the corporate parent's certification of self-insurance is to prohibit selective certification where some risks are self-insured while others are insured by the state fund. Nothing about this purpose requires that a self-insured corporate parent be considered its subsidiary's worker's "employer."

Nonetheless, under the majority opinion Paul Manor is barred as a matter of law from bringing a third party action, based solely on a single sentence in WAC 296-15-023(2). That single sentence, however, is beyond the authority of the Department of Labor and Industries to promulgate, and it is contrary to our workers' compensation scheme.

Moreover, the majority's result is unjust. If Manor had been covered under the state fund he clearly would not be barred from a third party action as a matter of law. The differing treatment the majority analysis accords the worker, who happens

to be covered by self-insurance rather than under the state fund, is unjustified. Further, Paul Manor has hardly received a windfall in the form of workers' compensation benefits. While he received over $455,000 in total benefits, over $437,000 of that amount represents medical benefits, attesting to the severe nature and consequences of his industrial injury. Finally, there is a fact question in this case whether Nestle Food even paid the workers' compensation costs attributable to Carnaco, Manor's employer, or whether those costs were paid by Carnaco. This is not the dispositive question, as explained below, but its existence simply underlines the unfairness of the majority's result in this case.

For these reasons, I dissent.

Initially, the issues in this case are more complex than the majority opinion indicates. In one short paragraph the majority concludes that the Department of Labor and Industries was within its delegated authority in promulgating WAC 296-15-023(2), but fails to address relevant statutes and policies affecting the validity of the WAC. The majority simply assumes that Nestle paid workers' compensation premiums and, by virtue of such payment, is entitled to immunity.

Turning first to the IIA, the statutes plainly contemplate that an *employer* may elect to become self-insured. RCW 51.08.173; RCW 51.14.010; RCW 51.14.020(1). The statutes nowhere contemplate that self-insuring confers the status of employer to one not otherwise an employer, and neither Nestle Foods nor the majority cites to any statute providing a self-insuring corporate parent is the "employer" of its subsidiary's workers.[1]

[1] Although the issue here is whether the corporate parent is or is not an employer by virtue of self-insurance, the majority several times assumes the answer to the question. *See* majority at 2 (Nestle Foods' predecessor Carnation "treated all of its employees, including. . . its Carnaco employees"); *id.* at 11 ("[t]o hold otherwise would deny Nestle the immunity from suit the IIA grants to all employers"); *Id.* at 20 ("[t]his Court has 'consistently held that when an employer . . . pays its industrial insurance premiums").

In addition, the self-insurance statutes were enacted by the Legislature to permit an alternative means of providing workers' compensation coverage. There is no inkling that the Legislature had in mind when enacting the statutes that by self-insuring a corporate parent could thereby change from nonemployer status to employer status to employer status and obtain immunity from civil liability in a third party action.

Nor is there any basis in the origins of the workers' compensation statutes for the corporate parent as an employer for purposes of the IIA. The quid pro quo compromise underlying the workers' compensation acts was effected before the advent of the modern system:

> Workmen's compensation laws were passed before the multi-unit enterprise became the norm in the American economy and before the accompanying managerial revolution in American business. See Chandler, *The Visible Hand* 377-498 (1977). For this reason, state workmen's compensation laws . . . do not address the question of a parent corporation's immunity from common law tort liability for injuries to its subsidiaries employe[e]s . . . .

Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658 (6th Cir.), *cert. denied*, 444 U.S. 836 (1979). *See also, e.g., Gigax v. Ralston Purina Co.*, 136 Cal. App. 3d 591, 186 Cal. Rptr. 395, 399 (1982) (because workers' compensation laws were passed before modern corporate structuring, whether parent corporation was entitled to immunity for injuries to an employee of kindred corporation was an "unresolved" "pristine" issue); *Hearn v. Petra Int'l Corp.*, 710 P.2d 769, 771 (Okla. Ct. App. 1985).

Today, giant multi-unit national and even international enterprises are common, and the IIA, the result of the compromise in Washington, could not have contemplated and did not

contemplate this modern business environment. The IIA has not remained static, of course, and numerous additions to its provisions have occurred over the years, adding new dimensions to the "compromise." However, as noted, there are no statutes addressing the parent-subsidiary issue raised in this case.

As Nestle Food's counsel conceded at oral argument, then, the sole basis for treating Nestle Foods as Manor's employer is WAC 296-15-023(2). WAC-296-15-023 provides that the self-insurance certification of a firm will include all of its subsidiaries doing business in Washington, and that one self-insurance certificate "will be issued to an approved self-insurer, including all subsidiaries or divisions. The entities will be considered as one employer for all purposes of Title 51 RCW." WAC 296-15-023(2). The purpose of the WAC is explained in an affidavit by a senior surety analyst with the Department of Labor and Industries who explained that the rule effectuates the Department policy "to prohibit selective certification where some risks are allowed to self-insure and others would be insured by the state industrial insurance fund." Clerk's Papers at 91.

This purpose does not, however, require that a self-insuring corporate parent be considered to be the employer of its subsidiary's employees. The same purpose could be achieved by simply requiring in such circumstances that all the affiliated companies must self-insure, without declaring that all such affiliates are "one employer" for purposes of the IIA.

In providing that affiliated companies are "one employer," the Department of Labor and Industries exceeded its authority when providing that affiliated companies constitute one employer if they self-insure. An administrative agency is limited to the powers and authority which the Legislature grants to it. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857, 621 P.2d 1293 (1980). In general, an agency or a board charged with enforcement of certain statutes may lawfully exercise delegated authority where the Legislature has provided standards or

guidelines, if adequate safeguards are provided in regard to promulgation of rules and testing the constitutionality of the rules after promulgation. *Auburn v. King County*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990); *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972), *appeal dismissed*, 410 U.S. 977 (1973). Authority may be delegated to determine a fact or issue of findings upon which application of the law is made to depend. *Fahn*, 93 Wn.2d at 374.[2]

If an agency rule exceeds its delegated authority, the rule is invalid. RCW 34.05.570(2)(c). This court has explained that under this principle, where the Legislature has specifically delegated rule-making authority to an administrator, the rules are presumed valid so long as they are reasonably consistent with the statutes being implemented. *St. Francis Extended Health Care v. Department of Social & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). However, if there are compelling reasons which show that the rule is in conflict with the content and purpose of the legislation, the rule will be struck down. *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 428, 799 P.2d 235 (1990).

For two reasons the provision in WAC 296-15-023(2) affiliated companies will be considered one employer for all purposes of the IIA is contrary to the content and the purpose of the IIA. First, the statutes provide that an *employer* may self-insure, but do not provide that an election to self-insure by a corporate parent makes that parent the employer. The rule is thus contrary to the RCW 51.08.173 and statutes to similar effect. Second, the rule is contrary to two policies of the IIA. The first is one this court previously and emphatically recognized in *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 630 P.2d 441 (1981): The thrust of RCW 51.14 is not that it is intended to treat

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[2] Although the majority criticizes the dissent for not explaining how WAC 296-15-023(2) is invalid, this paragraph, and the three which follow, address precisely that issue.

employees differently dependent upon whether they are covered under a self-insurance scheme or the state fund. *"Nowhere in RCW Title 51 is there even a hint that the legislature intended some covered employees to be treated differently than others." Johnson*, 95 Wn.2d at 745 (emphasis added). The second policy is recognition of the worker's important right to bring third party claims which is embodied in RCW 51.24.030(1). As this court has recognized, if an employment agreement is established, "moderate" benefits are available to the worker under the IIA. But where the employment relationship is asserted as a defense in a third party action, reaching the conclusion that an employment relationship exists "results in the destruction of valuable common-law rights to the injured work[er]." *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 555, 588 P.2d 1174 (1979).

These two policies foreclose the disputed WAC provision because it destroys the right of an injured worker to maintain a third party action solely because he or she is covered under a self-insurance program rather than under the state fund.[3]

If Paul Manor was not covered under a self-insurance would be no automatic bar to his third party suit. There are fact questions as to whether Nestle Foods was his employer under Washington's control test of an employment relationship for

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[3] In a footnote the majority seems to suggest that the Legislature has acquiesced in WAC 296-15-023(2)'s "interpretation" because the WAC has not been amended since promulgation. Majority at 6 n.2. Legislative acquiescence may be found where a statutory interpretation is left standing following legislative amendment of the statute. Here, however, there is no relevant statute which has been amended. Moreover, although I cannot see how the principle applies in this case at all, the rule of silent acquiescence following administrative construction of a statute applies only when the subsequent legislative consideration involves the same issue as that covered by the administrative rule. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984); *City of Seattle v. King County*, 52 Wn.App. 628, 633, 762 P.2d 1152 (1988), *review denied*, 112 Wn.2d 1002 (1989). There is no indication the Legislature has considered WAC 296-15-023(2).

purposes of workers' compensation which requires that "(1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." *Novenson*, 91 Wn.2d at 553; *accord Marsland v. Bullitt Co.*, 71 Wn.2d 343, 428 P.2d 586 (1967); *Fisher v. City of Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963); *see Jackson v. Harvey*, 72 Wn.App. 507, 864 P.2d 975, *review denied*, 124 Wn.2d 1003 (1994); *Smick v. Burnup & Sims*, 35 Wn.App. 276, 666 P.2d 926 (1983). Moreover, there are also fact questions about whether Nestle Foods and Carnaco have separate corporate identities or whether they have one identity and thus Nestle Foods is Manor's employer entitled to immunity under the IIA. *See generally* 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 72.40, at 14-290.29,.32-33 (1996)(footnotes omitted).

The overwhelming majority of courts in other jurisdictions have concluded, as the Court of Appeals did in *Meads v. Ray C. Roberts Post 969, Inc.*, 54 Wn.App. 486, 774 P.2d 49 (1989), that a parent corporation is not as a matter of law entitled to the workers' compensation immunity of its subsidiary.[4] *See, e.g.*, *Muniz v. National Can Corp.*, 737 F.2d 145 (1st Cir. 1984) (Puerto Rico law); *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (Kentucky law); *First Nat'l Bank v. Tracor, Inc.*, 851 F.2d 212 (8th Cir. 1988) (Arkansas law); *Love v. Flour Mills*, 647 F.2d 1058 (10th Cir. 1981) (Oklahoma law); *Gregory v. Garrett Corp.*, 578 F.Supp. 871 (S.D.N.Y. 1983) (Connecticut and North Carolina law); *Peterson v. Trailways, Inc.*, 555 F.Supp. 827

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[4] The majority thinks that this citation to other authority is irrelevant. Majority at 13 n.5. It also disputes the dissent's view that Manor would be treated differently had he been covered under the state fund. Majority at 17 N.6. However, there is no basis in the IIA for treating Paul Manor as Nestle's employee merely because he is covered under a self-insurance plan. That being the case, the common law is relevant to whether Nestle is his employer. Unless Nestle is his employer, his third party suit should not be barred.

(Colo. 1983); *Stoddard v. Ling-Temco-Vought, Inc.*, 513 F.Supp. 314 (C.D. Cal. 1980) (Texas law), *remanded on other grounds*, 711 F.2d 1431 (9th Cir. 1983); *Croxton v. Crowley Maritime Corp.*, 817 P.2d 460 (Alaska 1991); *Oliver v. Bluegrass Resources Corp.*, 284 Ark. 1, 678 S.W.2d 769 (1984); *Gigax v. Ralston Purina Co.*, 136 Cal.App. 3d 591, 196 Cal.Rptr. 395 (1982); *Gaber v. Franchise Servs., Inc.*, 680 P.2d 1345 (Colo.Ct.App. 1984); *Gulfstream Land & Dev. Corp. v. Wilkerson*, 420 So.2d 587 (Fla. 1982); *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995); *Phillips v. Stowe Mills, Inc.*, 5 N.C.App. 150, 167 S.E.2d 817 (1969); *Leeman v. Boylan*, 134 N.H. 230, 590 A.2d 610 (1991); *Volb v. G.E. Capital Corp.*, 139 N.J. 110, 651 A.2d 1002 (1995); *Samaras v. Gatx Leasing Corp.*, 75 A.D.2d 890, 428 N.Y.S.2d 48 (1980); *Hearn v. Petra Int'l Corp.*, 710 P.2d 769 (Okla.Ct.App. 1985); *Kiehl v. Action Mfg. Co.*, 517 Pa. 183, 535 A.2d 571 (1997); *Stratman v. Admiral Beverage Corp.*, 760 P.2d 974 (Wyo. 1988); *cf. Porter v. Beloit Corp.*, 667 F.Supp. 367 (S.D. Miss. 1987) (exclusive remedy provision of workers' compensation act did not bar suit against subsidiary corporation by employee of parent corporation); *Boswell v. May Ctrs., Inc.*, 669 S.W.2d 595 (Mo.Ct.App. 1994) (same); *Gurry v. Cumberland Farms, Inc.*, 406 Mass. 615, 550 N.E.2d 127 (1990) (involving affiliated and successor corporations). Some courts have held the corporate parent is entitled to immunity. *E.g.*, *Wells v. Firestone Tire & Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670 (1984) (under Michigan's economic reality test); *Rasnick v. Pittston Co.*, 237 Va. 658, 379 S.E.2d 353 (1989). *See generally* 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 72.40 (1996) (discussing immunity of affiliated corporations and citing numerous cases); Charles R.P. Keating & Gail O'Gradney, *Fletcher Cyclopedia on the Law of Private Corporations* § 43.80 (1990); Annot., *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation*, 30 A.L.R.4th 948 (1984).

[8 - 10]

The court should hold the WAC provision invalid. It neither serves its own purpose nor is it consistent with the IIA or its policies.

The majority says, though, that Nestle Foods is entitled to immunity because it paid costs of workers' compensation for Manor. Whether Nestle Foods paid costs of its subsidiary, and the extent to which corporate finances may have been intertwined is a question which is relevant to the issue whether the corporate parent and the subsidiary were in effect one entity entitled to immunity under the IIA. It is not, however, dispositive on the issue of whether Nestle Foods is Manor's employer. In *Marsland*, 71 Wn.2d 343, this court found no immunity for a company which had responsibility for workers' compensation premiums because the entity was not factually the worker's employer under the consent-control test. *See also, e.g., Gulfstream Land & Dev. Corp. v. Wilkerson*, 420 So.2d 587 (1982) (unless there is absolute integration of the two entities, a parent corporation is not the employer of the subsidiary's employee, and a joint policy of workers' compensation insurance does not provide a basis for immunity); *Stratman v. Admiral Beverage Corp.*, 760 P.2d 974, 984 (Wyo. 1988) ("[c]overage of affiliated corporations under the same worker's compensation insurance policy or state account is not relevant to the issue of whether the employee of one affiliate is also the employee of the other;" if the worker is not an employee of the particular corporation sued, that corporation is not immune regardless of whether it made fund payments).

In this case, there is also a fact question as to whether Nestle Foods paid the workers' compensation costs or whether they were charged back to Carnaco. Of course, charging them back would lend support to Manor's claim that Nestle Foods was not factually his employer because in that event it would be evidence that Carnaco had a separate corporate identity from Nestle Foods.

It is also significant to note that if Manor were able to pursue a third party claim against Nestle and prevail, he would not be entitled to any double recovery nor would Nestle have to pay more than his actual damages. Even if a corporate parent has provided self-insured workers' compensation coverage, the IIA provides for an offset or similar reduction of a damages award to account for workers' benefits paid. RCW 51.24.050; RCW 51.24.060. *Cf. Goodman v. Boeing Co.*, 127 Wn.2d 401, 404-06, 899 P.2d 1265 (1995) (where self-insuring employer paid time-loss benefits, that part of jury award against self-insuring employer for discrimination against employee which represented lost wages capacity was offset by time-loss benefits paid, and the self-insuring employer was subrogated to future workers' compensation benefits); 2A Arthur Larson & Lex K. Larson, *Law of Workmen's Compensation* § 72.97, at 14-342 (1996) (carrier sued as third party would be entitled to set off in judgment against itself as tortfeasor the amount of compensation paid by the carrier). Thus, a self-insuring corporate parent would not be obliged to fully pay both workers' compensation and benefits and tort damages and the employee would not obtain a double recovery.

Finally, I must point out that none of the four cases cited by the majority for the proposition that Nestle Foods should be considered Manor's employer in accord with the policy of the IIA supports that proposition. In *Wolf v. Scott Wetzel Servs., Inc.*, 113 Wn.2d 665, 782 P.2d 203 (1989) and *Deeter v. Safeway Stores, Inc.*, 50 Wn.App. 67, 747 P.2d 1103 (1987), *review denied*, 110 Wn.2d 1016 (1988), the courts held that the claims administrators hired by the employer were entitled to immunity under the IIA. In *Wolf*, 113 Wn.2d 665, the worker tried to bring a claim for wrongful delay of benefits based upon his entitlement to workers' compensation benefits. In *Deeter*, 50 Wn.App. 67, the worker sought damages based on delay in paying workers' compensation benefits and refusal to settle his industrial insurance claim. In each case "[t]he relationship of the employee, the

employer, and the claims adjuster for the employer . . . *flow[ed] from the rights and obligations created by the IIA, not from any independent source."* *Deeter*, 50 Wn.App. at 83-84 (emphasis added) (Grosse, J., concurring), *cited in Wolf*, 113 Wn.2d at 675-77. In marked contrast, the present case involves a claim for damages under tort law apart from any entitlement to workers' compensation benefits. Moreover, the second factor heavily influencing this court in *Wolf* was the fact that the IIA contains a penalty provision for wrongful delay or termination of benefits thus evidencing legislative intent that the remedy for wrongful delay or termination of benefits lies within the workers' compensation system. *Wolf*, 113 Wn.2d at 670 (citing RCW 51.48.017). There is no analogous provision in the IIA establishing legislative intent that a corporate parent is immune from a third party suit merely because its affiliated companies provide coverage through self-insurance.

In *Corr v. Willamette Indus., Inc.*, 105 Wn.2d 217, 713 P.2d 92 (1986), Willamette Industries absorbed Corco, Inc. in a corporate merger and acquired its plant equipment. After the merger, a worker employed by Western Paper Kraft Group, a wholly owned subsidiary of Willamette, was injured by machinery designed and built by Corco before the merger. The worker sued Willamette, arguing that it had succeeded to Corco's liabilities. This court affirmed the trial courts' dismissal of the action on the basis that Willamette was immune under the IIA. *The court did not address the parent/subsidiary immunity issue raised in this case, however.* Instead, the issue addressed was whether a corporation could be considered a third party under either the "dual capacity" or "dual persona" doctrines. Because the issue raised here was not addressed in *Corr*, it does not support the proposition that a corporate parent is the employer of its subsidiary's employee, as the Court of Appeals recognized in *Meads v. Ray C Roberts Post 969, Inc.*, 54 Wn.App. 486, 774 P.2d 49 (1989).

[12 - 13]

The last case is *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980). There the court disallowed a third party suit against the state for alleged negligent inspection by a state safety inspector acting pursuant to RCW 49.17, holding that the worker's failure to file a claim with the state's chief fiscal office precluded any third party action. *Id.* at 207. Further, the court observed in dicta that under former RCW 51.24.010 the Department was subrogated to the injured person's right against a third party, with the right to prosecute the action. If a third party action against the Department was possible, the Department would sue itself for not performing duties which are the Department's responsibilities under RCW 49.17, thus becoming plaintiff and defendant. The court did not believe "such an anomalous result" was intended by the Legislature. *Coulter*, 93 Wn.2d at 208. Although Nestle Foods argues similar anomalous results ensue if it is subject to a third party suit, the source of the problem is WAC 296-15-023 which requires the corporate parent to include subsidiaries in its certification, and not the statutes enacted by the Legislature. Moreover, as a practical matter, it is difficult to imagine Nestle wanting to pursue an action against itself if the injured worker elects not to sue. There seems to be little danger of a self-insuring corporate parent in these circumstances placing itself in the peculiar position of being both plaintiff and defendant in a suit. Finally, courts have rejected on various grounds the argument that legislatures could not have intended that a subrogated carrier sue itself, including the ground that the subrogation provisions simply did not deal with the issue whether the employee's common law right to sue a third party was taken away from him. 2A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 72.95, at 14-331 through 332 (1996) (citing cases).

The majority's result is not supported by the self-insurance provisions of the IIA, the history of the quid pro quo compromise underlying the IIA, this court's case law, or the purpose under WAC 296-15-023(2). The WAC is inconsistent with the IIA and its provisions, particularly because it results in unfairly treating

employees covered under a self-insurance program differently than those covered under the state fund, and it should be invalidated. I would hold that Paul Manor is not foreclosed as a matter of law from pursuing a third party action against Nestle Foods, and would accordingly affirm the Court of Appeals and remand this matter for further proceedings.[5]

/s/ Madsen, J.

/s/ Alexander, J.

/s/ Sanders, J.

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[5] The Court of Appeals also correctly concluded that Paul Manor's action is not barred by res judicata or collateral estoppel. Collateral estoppel is the relevant doctrine, and the reason it does not bar this action is because in light of WAC 296-15-023(2) the administrative body never had occasion to determine whether Nestle Foods was factually Manor's employer for purposes of a third party action.

THE SUPREME COURT OF WASHINGTON

No. 63133-6

PAUL E. MANOR, et al, Respondents,

v. ORDER CHANGING

NESTLE FOOD COMPANY, Petitioner. OPINION

It is hereby ordered that the opinion in the above cause, as the same appears at 131 Wn.2d 439, be changed as follows: Footnote 3 at the bottom of page 446 is deleted, and the following footnote is inserted in its place:

> [3] In *Weyerhaeuser Co. v. Department of Ecology*, 86 Wn.2d 310, 545 P.2d 5 (1976), we first set forth the standard of review for agency regulations. We now ask only whether the challenged regulation is "reasonably consistent with the statute being implemented." *St. Francis Extended Health Care v. Department of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). We believe the four-part test for evaluating the validity of an agency rule under the APA set forth at RCW 34.05.570(2)(c) helpfully informs the "reasonably consistent" inquiry, and we adopt it as the standard for review of agency rules.

[File stamp, Supreme Court, State of Washington, 97 Oct-7 p.m. 1:33 by C. J. Merritt, Clerk

Dated this 7th October, 1997.

/s/ Durham, C.J.
Chief Justice

Approved:
/s/ Dolliver, J.
/s/ Smith, J.

/s/ Guy, J.

/s/ Talmadge, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR and LYNETTE MANOR, husband and wife,	)	NO. 93-2-00044-1
	)	JUDGMENT AND
	)	ORDER GRANTING
Plaintiffs,	)	DEFENDANT'S
vs.	)	MOTION TO DISMISS
NESTLE FOOD COMPANY,	)	AND AWARDING
Defendant.	)	STATUTORY
	)	ATTORNEY'S FEES

Judgment Creditor: Nestle Food Company
Judgment Creditor's Attorney: Wayne L. Williams
Judgment Debtors: Paul E. and Lynette Manor
Judgment Debtors' Attorney: John Luke McKean
Judgment Amount: $125.00 (statutory attorney's fees)

THIS MATTER came on before the Honorable Richard W. Miller, on December 1, 1993, by virtue of the Defendant's Motion to Dismiss. The Plaintiffs appeared by and through their attorneys, McKean Law Office, per John Luke McKean. The Defendant appeared by and through its attorneys, Rolland, O'Malley, Williams & Wyckoff, P.S., per Wayne L. Williams.

The court has considered the Defendant's Motion to Dismiss; Defendant's Memorandum of Authorities in Support of Motion to Dismiss; Plaintiff's Memo Re: Res Judicata; Plaintiffs' Supplemental Memo re: "Fellow Servant"; Defendant's Second Memorandum of Authorities in Support of Motion to Dismiss; Defendant's Response to Plaintiffs' Fellow-Servant Arguments; Affidavit of Paul Manor Re:

ROLLAND, O'MALLEY, WILLIAMS & WYCKOFF, P.S.
P. O. Box 316
Olympia, Washington 98507
Telephone (206) 352-9331
Facsimile (206) 943-2430

"Employment"; Plaintiffs' Memorandum Re: Employment / Motion to Dismiss; the affidavits and exhibits attached to the memoranda; Plaintiff's Declaration Re: Documents Re: Employment and attached documents, and having heard and considered the argument of counsel, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Title 51 RCW the Defendant is immune from suit and this court lacks subject matter jurisdiction. It [*sic.*] this court had jurisdiction, this action would be barred by res judicata.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Dismiss is hereby DISMISSED, with prejudice. Defendant is AWARDED statutory attorney's fees in the amount of One Hundred Twenty Five Dollars and NO/100 ($125.00).

DONE IN OPEN COURT THIS _____ day of _____, 1994.

[our copy not dated nor signed]

_____
Judge Richard W. Miller

Presented by:

ROLLAND, O'MALLEY, WILLIAMS
& WYCKOFF, P.S.

/s/ Wayne L. Williams
Wayne L. Williams, WSBA# 4145
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Court of Appeals
State of Washington - Division III
Date May 30 1995
/s/ Philip J. Tharp
Chief Judge

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

PAUL E. MANOR and LYNETTE MANOR, husband and wife,	)	No. 13819-4-III
	)	Division Three
Appellants,	)	Panel Three
v.	)	
NESTLE FOOD COMPANY,	)	
Respondent,	)	Filed May 30 1995

MUNSON, J.--Paul E. and Lynette Manor appeal the summary judgment dismissal of their personal injury claim against Nestle Food Company. Because we hold a self-insured parent company is not, as a matter of law, the "employer" of its subsidiary's workers and that the Manors' suit is not barred by a previous Department of Labor and Industries' determination, we reverse.

Mr. Manor was injured January 15, 1992, at the Carnation Processed Potato Plant in Othello when a forklift driver backed over his foot. On January 26, he was hospitalized and diagnosed as having acute inflammatory polyradiculoneuropathy (Guillain-Barre syndrome). He became completely paralyzed and was placed on a respirator until June 1. He remained hospitalized until November 20, when he was allowed to go home although he still needed assistance with basic living functions.

Mr. Manor began driving truck for Midwest Motors, a division of the Carnation Company, in 1975. In 1981, Midwest Motors was incorporated as Carnaco Transport, Inc. Carnaco maintained facilities in Moses Lake separate and distinct from the facilities owned by Carnation in Moses Lake. As a Carnaco driver, Mr. Manor often hauled general freight for businesses that were not related to Carnation.

In 1979, Carnation was authorized to self-insure its workers' compensation liability in Washington. This included the liability of its subsidiary Carnaco. In 1985, Carnation became a wholly owned subsidiary of Nestle Holdings, Inc., and the name was changed to Nestle Food Company in 1991.

Mr. Manor filed a workers' compensation claim on January 15, 1992, the day of the injury. On February 14, the Department of Labor and Industries issued a notice of decision allowing Mr. Manor's claim. The Manors filed suit against Nestle seeking damages as a result of Mr. Manor's injury on April 14, 1993, and on January 21, 1994, the trial court granted Nestle's motion to dismiss. The Manors now appeal that dismissal.

When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as did the trial court. Barr v. Day, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). The summary judgment must be affirmed if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Under RAP 9.12, only the evidence and issues called to the attention of the trial court may be considered on appeal . All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. Caritas Servs., Inc., v. Department of Social & Health Servs., 123 Wn.2d 391, 402, 869 P.2d 28 (1994).

Here, the facts are essentially undisputed; the parties raise only issues of law. The first such issue is whether Nestle is Mr. Manor's employer as a matter of law and, thus, immune from suit. The Manors contend the question is one of fact, not of law.

Under Washington's workers' compensation statutes, RCW 51, employees injured in their work may not sue their employers; their relief is limited to that provided by workers' compensation "except as otherwise provided in this title". RCW 51.04.010. One of those exceptions permits an injured worker to sue a third party "not in a worker's same employ" who may be liable for his or her injuries. RCW 51.24.030(1).

"For purposes of workmen's compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." Novenson v. Spokane Culvert & Fabricating Co., 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). Both of these prongs present questions of fact. Smick v. Burnup & Sims, 35 Wn.App. 276, 279, 666 P.2d 926 (1983).

In Washington, there are two methods by which employers may provide workers' compensation coverage for their employees: (1) they may insure with the state fund; or (2) if qualified, they may self-insure. RCW 51.14.010. Nestle is a qualified self-insurer. Nestle argues it, together with its subsidiaries, must be considered as one employer under WAC 296-15-023. WAC 296-15-023 deals with certification of self-insurers; it states:

> (1) The certification of a firm will include all of its subsidiaries or divisions doing business in the state of Washington. A subsidiary is defined, for the purpose of this rule, as an entity which is fifty percent owned and has its interest controlled by another single firm.

> (2) One certificate will be issued to an approved self-insurer, including all subsidiaries or divisions. The entities will be considered as one employer for all purposes of Title 51 RCW.

(Italics ours.) Nestle maintains that it, as well as Carnaco, must be considered Mr. Manor's employer, and that it is consequently immune from any lawsuit arising from the injury.

Included in the record is an affidavit of Larry J. Wilkinson, senior surety analyst with the Department of Labor and Industries. Mr. Wilkinson states the policy behind the requirement a self-insurer include all subsidiaries or divisions is to prevent an employer from selectively self-insuring some risks while leaving others insured by the state fund.

In Meads v. Ray C. Roberts Post 969, Inc., 54 Wn.App. 486, 774 P.2d 49 (1989), an employee of Ray C. Roberts Service Club, Inc., was injured at work. She sued Ray C. Roberts Post 969, Inc., the owner of the building. The court stated:

> The Post argued essentially that the Service Club corporation was a subsidiary of and completely controlled by the Post, and that, ipso facto, this made Meads the Post's employee. The trial court agreed; we do not. We reverse.
>
> . . . Corr [v. Willamette Indus., Inc., 105 Wn.2d 217, 713 P.2d 92 (1986)] does not support the Post's "parent-subsidiary ipso facto" argument, nor does any other Washington case.

Meads, at 487-88. Under Meads, if Nestle had been a participant in the state fund rather than a self-insurer, it would not, as a matter of law, have been immune from the Manors' suit. Our Supreme Court has stated that employees should receive the same treatment whether their employer is self-insured or insures through the state fund:

> At no place in the statute is there any suggestion that employees who are employed by self-insurers are somehow to receive fewer benefits than those employees whose employers are under the state system. Nowhere in RCW Title 51 is there even a hint that the legislature intended some covered employees to be treated differently than others.

Johnson v. Tradewell Stores, Inc., 95 Wn.2d 739, 745, 630 P.2d 441 (1981).

Where, as here, an agency has specifically been delegated rule-making power by the Legislature, its regulations are presumed valid. Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 314, 545 P.2d 5 (1976). A challenged regulation will be upheld if it is reasonably consistent with the statute it implements. Weyerhaeuser, at 314.

To the extent WAC 296-15-023 requires all self-insurers to include subsidiaries and divisions, it prevents an employer from selectively self-insuring its low risk employees while leaving its high risk employees insured with the state fund. To that extent, it is reasonably consistent with RCW 51. However, it is not reasonably consistent to the extent it requires all entities covered by a self-insurance certification to be considered one employer for all purposes under RCW 51. To do so may result in the denial of a worker's right to bring a third party claim against the parent company of his employer merely because the parent chose to self-insure.[1]

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[1] We note corporate mergers, consolidations, and combinations are commonplace in today's business world. In Jackson v. Harvey, 72 Wn. App. 507, 519, 864 P.2d 975, review denied, 124 Wn.2d 1003 (1994), the court noted an employee should not be required to guess who his employer is. Similarly, an employee should not have to guess whether a particular corporation is related to his employer as parent or some other affiliate.

Nestle was not, as a matter of law, Mr. Manor's employer. Construed most favorably toward the Manors, the affidavits present material issues of fact as to whether Nestle could be considered Mr. Manor's employer. Summary judgment was improper.

The second issue raised by the parties is whether the Department's February 14, 1992 "Notice of Decision" precludes the Manors' claim either through res judicata or collateral estoppel. The Manors contend it does not. The notice issued by the Department allowed both time loss compensation and medical benefits because Mr. Manor had "sustained an injury while in the course of employment with a self-insured employer". The notice lists Mr. Manor's "EMP" as Nestle and gives Carnaco's Moses Lake address as the work location.[2]

In Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967), the Department denied a worker's claim he was injured by a power tamper stating the tamper did not cause the injury. In his later suit against the manufacturer of the tamper, the manufacturer argued the claim was precluded because the Department's decision was res judicata. The court set forth the requirements for the application of res judicata:

> To make a judgment res judicata in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.

Bordeaux, at 396 (quoting Northern Pac. Ry. v. Snohomish Cy., 101 Wash. 686, 688), 172 P. 878 (1918)). Of the four, the court found only a concurrence of subject matter, and thus held the suit was not barred by res judicata.

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[2] Mr. Manor's claim identified Carnaco as his employer.

Here, as in Bordeaux, there is a concurrence of subject matter--Mr. Manor's injuries are the subject of both actions. The causes of action, however, are different. Mr. Manor's negligence claim against Nestle is based on fault. Fault is not an issue in a workers' compensation claim. As a self-insurer, Nestle was a party to the action before the Department. Bordeaux, at 399. Thus, there is a concurrence of persons and parties. However, the quality of the person against whom the claim is made differs. In the workers' compensation claim, Nestle's position was not adversarial while it is clearly an adversary in the present claim. In short, there is not such a concurrence of identity between the claims that the present claim should be barred by res judicata.

In Malland v. Department of Retirement Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985), the court stated the requirements for the application of collateral estoppel:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Here, it is not clear from the Department's order whether it considered the question of whether Nestle or Carnaco was Mr. Manor's employer. Nor does it appear such a determination was necessary to the Department's decision. In either case, Mr. Manor's workers' compensation claim would have been under Nestle's self-insurance certificate. While the Department's decision is final as to Mr. Manor's entitlement to workers' compensation benefits, the Department does not appear to have addressed the merits of the Manors' current claim. The Manors are not raising the identical issue, and the Department's

decision was not a final judgment as to the merits of the current claim. As noted, Nestle was a party to the action before the Department. Thus, both Nestle and the Manors were parties to the earlier proceeding. Finally, because Mr. Manor was completely paralyzed and on a respirator in intensive care at the time the notice was issued and throughout the 60 days allowed for appeal, application of the doctrine would work a serious injustice against him. The Manors are not collaterally estopped from asserting their claim against Nestle.

The summary judgment is reversed and the case remanded for trial.

/s/ Munson, J.

/s/ Thompson, C.J.

/s/ Schultheis, J.

GEOFFREY CROOKS
Commissioner

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THE SUPREME COURT
STATE OF WASHINGTON

STEVEN M. GOFF
DEPUTY
COMMISSIONER

[Seal]

April 24, 1997

Mr. James F. Leggett
Leggett & Kram
1901 South I Street
Tacoma WA 98405-3810

RE: ***Manor v. Nestle Food Co.***, Cause No. 63133-6

Dear Mr. Leggett:

The Chief Justice has denied your motion to file an amicus curiae brief, on behalf of Connie June Miller and others, in support of the pending motion for reconsideration in this case. In the event the court grants reconsideration, however, you may renew your request for amicus status.

Yours very truly,
/s/
Geoffrey Crooks
Commissioner

GC:sw
cc: Mr. Wayne L. Williams
Mr. John H. McKean
Mr. Craig A. Staples
Clerk

THE SUPREME COURT OF WASHINGTON

No. 63133-6

PAUL E. MANOR, et al, Respondents,

v.

NESTLE FOOD COMPANY, Petitioner.

ORDER DENYING MOTION FOR RECONSIDERATION

[File Stamp]
[Supreme Court, State of Washington]
[97 Oct 7 PM 1:38]
[By C. J. Merritt, Clerk]

The Court having considered the Respondents' Motion for Reconsideration;

Now, therefore, it is hereby

ORDERED:

That the Respondents' Motion for Reconsideration is denied.

DATED at Olympia, Washington this 7th day of October, 1997.

/s/ Durham, C.J.
CHIEF JUSTICE

131 Wn.2d 439

Supplemental citations from chapter 296-17 WAC:

WAC 296-17-310 General rules and instructions.

This section constitutes general rules and instructions for chapter 296-17 WAC.

(1) **Purposes.** This chapter of the Washington Administrative Code, including classifications of risk, premium rates, the experience rating plan, and all other rules contained herein governing the use thereof, is herein referred to as the manual. This manual is promulgated by the department of labor and industries pursuant to RCW 51.16.035. This manual contains a formulation of the rules and regulations providing for basic classifications, rates of premium, method of premium calculation and collection, and a rating system, consistent with recognized principles of workers' compensation insurance. This manual governs the department's underwriting of workers' compensation insurance and assessment of other monetary obligations, under the industrial insurance law of the state of Washington, Title 51 RCW.

(2) **Overview.** Washington law (RCW 51.16.035) requires that the department of labor and industries classify all occupations or industries by degree of hazard. To accomplish this, the department has established approximately three hundred classifications of risk embracing the various industries within the state (the actual number may vary from year to year). These classifications are set forth in WAC 296-17-501 through 296-17-779. The general principles and objectives of the basic classification system are set forth in WAC 296-17-310.

The first step in determining the appropriate classification for an employer is to determine the nature of the employer's business being insured in this state. If the department determines that an employer's business consists of a single operation or a number of separate operations which normally prevail in that business then the single enterprise rule (WAC 296-17-380) is applicable. This rule provides that the department is to assign the single basic classification which most

accurately describes the employer's entire enterprise. This process begins with the search for a basic classification which specifically describes the employer's business. If such a basic classification is found the process of assigning a basic classification is complete.

If the employers' business operation is not specifically described by any basic classification then the employer's business is to be classified as provided for in WAC 296-17-360 (assignment of classification by analogy). In classifying by analogy the department examines the process and hazard of the employer's business and compares it to that of other basic classifications with processes and hazards that are similar to those of the employer's business and assigns the most analogous classification on that basis.

In the event that a review of the employer's business operations indicates the possibility that the employer conducts more than one business within this state, a determination will be made as to whether any additional basic classifications should be assigned on the basis of the criteria set out in the multiple enterprise rule (WAC 296-17-390).

Once the employer's basic classification has been established, the department must determine whether additional classifications should be assigned to apply to specific employments within an employer's business such as the standard exception rule (WAC 296-17-440), the general exclusion rule (WAC 296-17-430), the special exception rule (WAC 296-17-441), or those indicated by the language of any applicable basic classifications that permit or require separate reporting of any operations within that business or industry or as otherwise provided by this chapter.

(3) **Premium payments - quarterly reports.** Each employer shall, upon such forms as prescribed by the department, prior to the last day of January, April, July and October of each year, pay to the department for the preceding calendar quarter, for the accident fund, and for the medical aid fund, a certain number of cents for each worker hour or fraction thereof worked by the worker in their employ except

when the rules of this manual provide for a different method of premium computation. Provided, that in the event an employer has no employment subject to coverage under Title 51 RCW during a calendar quarter the employer shall submit to the department, according to the schedule described above, a quarterly report indicating "no payroll" or be subject to the penalties provided for in RCW 51.48.210. The director may promulgate, change and revise such rates at such times as necessary, according to the condition of the accident and medical aid funds, and assign rates as appropriate to employers who voluntarily seek coverage under the elective adoption provisions of the law.

(4) **Determining accident fund premium.** The amounts to be paid into the accident fund shall be determined as follows: The department shall determine a manual premium rate for each classification which shall not be inadequate, excessive or unfairly discriminatory, taking into consideration past and prospective costs in each classification and the financial condition of the accident fund as a whole.

Every employer shall pay into the accident fund at the manual premium rate unless such employer meets the requirements for the experience rating plan provided elsewhere in this manual, in which event such employer's premium rate for the accident fund shall be paid according to their experience modification as determined under the experience rating plan.

(5) **Basis for determining medical aid premium.** The amounts to be paid into the medical aid fund shall be determined as follows: The department shall determine a manual medical aid rate for each classification which shall not be inadequate, excessive or unfairly discriminatory, taking into consideration past and prospective costs in each classification and the financial condition of the medical aid fund as a whole.

Every employer shall pay into the medical aid fund at the manual premium rate unless such employer meets the requirements for the experience rating plan provided elsewhere in this manual, in which event such employer's premium rate for the medical aid fund shall be paid according to their experience modification as determined under the experience rating plan.

(6) All section captions or titles or catch lines used in this manual, chapter 296-17 WAC, do not constitute any part of these rules.

(7) **Assignment of classifications.** The classifications in this manual are all basic classifications other than the standard exception classifications which are defined in WAC 296-17-440 and those classifications specified in subsection (9) of this section. Basic classi-fications are used to implement the object of the classifica-tion system, which is to assign the one basic classification which best describes the business of the employer within this state. Each basic classification includes all the various types of labor found in a business unless it is specifically excluded by language contained within the classification or covered by a separate rule found elsewhere in this chapter, such as "standard exceptions" or "general exclusions." The classification procedure used within this state is intended to classify the business undertaking of the employer and not the separate employments, occupations, or operations of individuals within a business.

In the event an employer operates a secondary business within this state, multiple basic classifications can be assigned provided that the conditions set forth in WAC 296-17-390 "multiple enterprises" have been met. However, construction or erection operations are to be assigned classifications as provided in WAC 296-17-45003 "Special construction industry rules."

(8) **Classification assignment of separate legal entities.** Each separate legal entity shall be assigned to the basic classification or classifications which best describe its operations within the state using the classifi-cation procedures outlined in subsections (2) and (7) of this section and WAC 296-17-45003.

(9) **All operations.** Each basic classification in this manual includes all the operations normally associated with the business undertaking without regard to the location(s) of such operation(s) unless an operation is specifically excluded from the manual language of the basic classification. The following classifications are not considered to be basic classifications and

are limited in scope to the definition contained within each classification 4806, 4904, 5206, 6301, 6302, 6303, 7101 or the temporary help classifications 7104 through 7121.

WAC 296-17-360 Assignment of classification by analogy. The classification section of this manual contains a listing of basic classifications covering most businesses and industries.

Any enterprise or operation which is not described by such classifications shall be assigned to the basic classification(s) most analogous from the standpoint of process and hazard.

The alphabetical index section of the manual includes a number of businesses and industries that are not contained in the rule part of this manual. When such a listing is identified by the letter "A" standing for analogy, it is the intended purpose of this symbol and listing of such operations in the index to be included in the same manner as if such operations were contained in the rule part of this manual.

The limitations and conditions of the basic classification(s) so assigned and all manual rules pertaining thereto shall be applicable: *Provided,* That when a basic classification carries the phraseology of N.O.C. and the business undertaking of the employer to be classified is not specifically described by a basic manual classification or listed in the alpha index but the classification containing the phraseology of N.O.C. contains common or similar businesses or industries it is intended that the operation be classified into the N.O.C. Code.

WAC 296-17-370 Governing classification. The governing classification of a risk is defined as that classification, other than classifications 4806, 4904, 5206, 6301, 6302, 6303, 7101 or temporary help classifications 7104 through 7121, which carries the largest number of worker hours. Provided, that this rule is only applicable when multiple basic classifications are to be assigned to an employer's business undertakings.

WAC 296-17-380 Single enterprise. If the employer's business, conducted at one or more locations, consists of a single operation or a number of separate operations which normally prevail in the business described by a single basic classification, that single classification which most accurately describes the entire enterprise shall be applied. Division of worker hours shall be made as provided hereinafter in respect to standard exceptions, general exclusions and special exceptions. No division of worker hours shall be permitted in respect to any other operation even though such operation may be specifically described by some other classification, unless the applicable classification phraseology or other manual provision specifically provides for such division of worker hours.

WAC 296-17-390 Multiple enterprises. If an employer operates a secondary business within this state, an additional basic classification shall be assigned only if the following conditions exist:

(1) The secondary business does not normally prevail in the principal business undertaking of the employer.

(2) The secondary business is conducted as a separate undertaking or enterprise. This condition does not apply if the classification wording requires the assignment of an additional classification for specified employees or operations.

(3) Separate and distinct payroll records are maintained for each business undertaking.

(4) Each business is physically separated by structural partitions and is conducted without an interchange of labor.

(5) The assignment of the separate classification is not prohibited by the wording of the classification governing the principle business undertaking of the employer or any other classification assigned to the employer.

If all of the above conditions do not exist:

(a) All employees shall be assigned to the classification applicable to the principle business if the classification for the principle business carries a rate which is the same or higher than that for the classification of the secondary business.

(b) The secondary business shall be assigned to the classification which describes that business if such classi-fication carries a rate higher than that applicable to the principal business.

(c) The principle business is the business with the greatest number of worker hours, excluding standard exception or general exclusion operations.

(6) Employers with more than one classification may have employees working in connection with several classifications. Payroll assignment for such employees is subject to WAC 296-17-410 "division of single employee's worker hours."

MOUNTAIN TIMBER COMPANY, Plff. in Err.,
v. STATE OF WASHINGTON.
(See S. C. Reporter's ed. 219-246.)

Constitutional law - due process of law - Workmen's Compensation Act - validity as against employees.

1. Rights of employees under U.S. Const. 14th Amend. are not invaded by the abolition, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), of private rights of action for damages in case of disabling or fatal accidental personal injuries received by employees in certain employments denominated "extra hazardous" (and in any other industry, at the option of employer and employees), and the substitution of a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazards of each class of occupation.

[For other cases, see Constitutional Law, IV.b, 7, in Digest Sup. Ct. 1908.]

Note. -- On Workmen's Compensation Acts--see notes to Milwaukee v. Miller, L.R.A.1916A, 23, and Linnane v. Aetna Brewing Co. L.R.A. 1917D, 80.

On constitutionality of Workmen's Compensation and Industrial Insurance Statutes--see notes to Jensen v. Southern P.Co. L.R.A. 1916A, 409, and Hunter v. Colfax Coal Co. L.R.A. 1917D, 51.

Courts -- jurisdiction -- political question -- republican form of government.

2. Whether or not a state has violated the provision of U. S. Const. art. 4, § 4, guaranteeing to every state in the Union a republican form of government, is not a judicial question, but is a political one, which is solely for Congress to determine.

[For other cases, see Courts, I. c, 2; Constitutional Law, III. c, in Digest Sup. Ct. 1908.]

Jury -- right to trial by -- effect of Workmen's Compensation Act.

3. The right to trial by jury, guaranteed by U. S. Const. 7th Amend., cannot be said to be infringed by the Washington Workmen's Compensation Act (Wash. Laws 1911, Chap. 74), on the theory that if such act be valid, it must be followed in the Federal courts in cases that are within its provisions, where there is nothing in such act that excludes trial by jury in any private rights of action which are preserved, and, as between employer and employee, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by a jury.

[For other cases, see Jury, I. d, In Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- equal protection of the laws -- Workmen's Compensation Act.

4. A state may, consistently with U.S. Const. 14th Amend., substitute a system of compulsory compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain so-called hazardous employments without regard to fault of the employer, in lieu of the existing right to maintain actions for damages in cases of the employers' negligence, in which the latter may assert immunity for the negligence of a fellow servant and the defenses of contributory negligence and assumed risk. [For other cases, see Constitutional Law, IV. a, 5; IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- equal protection of the laws -- Workmen's Compensation Act.

5. The exaction, under the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), from employers in certain industries denominated "extra hazardous," without regard to any wrongful act on their part, or to whether

injuries have befallen their own employees or not, of periodical contributions based upon percentages of pay rolls to a state fund from which compensation shall be made for disabling or fatal injuries received by employees in the course of their employment in such industries, is not inconsistent with the due process of law and equal protection of the laws clauses of U. S. Const. 14th Amend., but such exaction is a valid exercise of the state's police power, there being no claim that the scale of compensation is unduly large, and the schedule of contribution evidencing an intent to proportion the various percentages according to the hazard of each of the groups into which the industries are divided, and to limit the burden to the requirements of each industry.

[For other cases, see Constitutional Law, IV. a, 5; IV. b, 7; IV. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- equal protection of the laws -- Workmen's Compensation Act.

6. The evident purpose of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), to classify the various occupations according to the respective hazard of each, is a sufficient answer (there being no particular showing of erroneous classification) to the objection, founded on U. S. Const. 14th Amend., that the statute goes too far in classifying as hazardous large numbers of occupations that are not hazardous in their nature.

[For other cases, see Constitutional Law, IV. a, 5; IV. b, 7, in Digest Sup. Ct. 1908.]

Statutes -- construction favoring constitutionality.

7. The Federal Supreme Court will not assume, in the absence of an actual decision of the state court, that the provision of the Washington Workmen's Compensation Act (Wash. Laws 1911, chap. 74), making it unlawful for the employer to deduct any part of his compulsory contribution to the state fund created by the act from the wages or earnings of

his workmen, will be so broadly construed as to bring it in conflict with the Federal Constitution.

[For other cases, see Statutes, II. a, in Digest Sup. Ct. 1908.]

[No. 13]

Argued March 1 and 2, 1916. Restored to docket for reargument November 13, 1916. Reargued January 30, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Cowlitz County, in that state, in favor of the state in an action to recover certain premiums alleged to be due under the Workmen's Compensation Act. Affirmed.

See same case below, 75 Wash. 581, L.R.A. —,—. 135 Pac. 645, 4 N.C.C.A. 81].

The facts are stated in the opinion.

Messrs. F. Markoe Rivinus and Theodore W. Reath argued the cause, and, with Messrs. Edmund C. Strode and Coy Burnett, filed a brief for plaintiff in error:

The considerations advanced by our opponent are expressions of good intentions against which Webster warned.

2 Writings & Speeches of Daniel Webster, National Ed. Little, Brown & Co. 1903, pp. 207, 208.

Under the pretext of the police power a state may not abrogate the guaranties of the 14th Amendment.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Muller v. Oregon, 208 U. S. 420, 52 L. ed. 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

The Washington Compensation Act is not referable to the taxing power.

Cooley, Taxn. p. 1125; Citizens' Sav. & L. Assn. v. Topeka., 20 Wall. 655, 22 L. ed. 455; Chicago v. Sturges, 222

U. S. 313, 323, 324, 56 L. ed. 215, 220, 221, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349; Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Ohio & M. R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259; Ives v. South Buffalo R. Co. 201 N. Y. 320, 34 L.R.A.(N.S.) 162, 94 N.E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517.

A compulsory Workmen's Compensation Act takes the employer's property without legal reason, invades his and his employee's right of private contract in a matter with which the public has no concern by introducing a term of industrial insurance, and is not the due process or equal protection required by the 14th Amendment.

Dartmouth College v. Woodward, 4 Wheat. 518, 581, 4 L. ed. 629, 645; Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 562; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 524, 525, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535.

The current of judicial decision in the United States appears to incline toward the unconstitutionality of workmen's compensation legislation in compulsory form. Evidently for this reason have so many states adopted the voluntary form. As of interest the following cases, upholding voluntary compensation laws on the theory of contract, are cited:

Opinion of Justices, 209 Mass. 607, 96 N.E. 308, 1 N.C.C.A. 557; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N.W. 209, 3 N. C. C. A. 649; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Clem v. Chalmers Motor Co. 178 Mich. 340, L.R.A. 1916A, 352, 144 N.W. 848, 4 N. C. C. A. 876; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N.E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Hawkins v. Bleakley, 220 Fed. 378; Matheson v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A. 1916D, 412, 148 N.W. 71, 5 N. C. C. A.

871; Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244; Bayou v. Beckley, 89 Conn. 154, 93 Atl. 139, 8 N.C.C.A. 588; Behringer v. Inspiration Consol. Copper Co. 17 Ariz. 232, 149 Pac. 1065; Coakley v. Mason Mfg. Co. – R. I. –, Atl. 1073; De Constantin v. Public Service Commission, 75 W. Va. 32, L.R.A. 1916A, 329, 83 S. E. 88.

In New York a constitutional amendment was deemed necessary to overcome the due process of the New York Constitution. Probably for the same reason express constitutional authority for such legislation was thought necessary in the state of Ohio in order to substitute for the previous elective compensation law, a law in compulsory form.

Porter v. Hopkins, 91 Ohio St. 74, 109 N. E. 629, 9 N. C. C. A. 839.

So, too, in California it was thought necessary to amend the state Constitution in order to pass such a law in compulsory form.

Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N.C.C.A. 1.

On the other hand, without an enabling constitutional provision the original compulsory compensation law of the state of New York was declared repugnant to the due process clause of the New York Constitution (Ives v. South Buffalo R. Co., 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N.C.C.A. 517). And in Texas, in spite of the color of a voluntary form, a compensation law has been declared repugnant to the due process clause of the Federal and the Texas Constitutions (Middleton v. Texas Power & Light Co. – Tex. Civ. App. – , 178 S. W. 956, 9 N.C.C.A. 847). In Kentucky a compensation law in voluntary form was declared unconstitutional as really compulsory (Kentucky State Journal Co. v. Workmen's Compensation Bd. 161 Ky. 562, L.R.A. 1916A, 389), 170 S. W. 437, 1166, Ann. Cas. 1916B, 1273).

The law of property affords security to one in the

possession of his property who is without fault, actual or constructive.

Harvey v. Dunlap, Hill & D. Supp. 193; Nitro-glycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Schenck v. Union P. R. Co. 5 Wyo. 430, 40 Pac. 840; Cantril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Camp [column omitted here] v. Rogers, 44 Conn. 297; Black, Const. Law, 2d ed. 351.

Any legislation which interferes with the equality of right of employer and employee is an arbitrary interference with the liberty of contract which no government can legally justify in a free
land.

Adair v. United States, 208 U. S. 161, 175, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

Messrs. Edmund C. Strode and Coy Barnett filed a separate brief for plaintiff in error:

As far back as 1798, the Supreme Court of the United States in Calder v. Bull, 3 Dall. 386, 1 L. ed. 648, was called upon to warn the people of the United States that the Constitution must be held sacred, and that no authority upon any pretext should be allowed to supersede the same.

See also Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

The Washington statute denies the right to trial by jury.

Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

The act unconditionally requires employers engaged in occupations enumerated therein to make payment to a fund for the benefit of employees, without regard to any wrongful act of the employer. In addition to taking away all of his defenses, it makes him liable from the mere fact that he employs the person injured. He is given by this act no day in court to determine his liability for a failure to comply with the law, and is given no opportunity to be heard as to how much of his property should be taken, whether he is or is not at fault.

This amounts to depriving Mountain Timber Company of its property without due process of law, and denies to it the equal protection of the laws.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; State v. Strasburg, 60 Wash. 106, 32 L.R.A. (N.S.) 1216, 110 Pac. 1020, Ann. Cas. 1912B, 917; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Louisville & N. R. Co. v. Baldwin, 85 Ala. 619, 7 L.R.A. 266, 5 So. 311; Wadsworth v. Union P. R. Co. 18 Colo. 600, 23 L.R.A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Zeigler v. South & North Ala. R. Co. 58 Ala. 594, Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602; Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Bennett v. Ford, 47 Ind. 264; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Lewis v. Flint & P. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; Steffen v. Chicago & N. W. R. Co. 46 Wis. 259, 50 N. W. 348; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 304; California Reduction Co. v. Sanitary Reduction Works,

C. C. A. 91, 126 Fed. 34; Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N. E. 1007; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Redmon, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; State ex rel. Richey v. Smith, 42 Wash. 237, 5 L.R.A. (N.S.) 674, 114 Am. St. Rep. 114, 84 Pac. 851, 7 Ann. Cas. 577; Lawton v. Steel, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 449.

A comparison of the acts of the various states with the act in question shows a radical difference in that the act in question is made compulsory, and the employer and employee are compelled to come under the act, whether voluntarily or involuntarily. Many of the courts of the various states which have passed upon the constitutionality of the acts of other states have made a point of the fact that the acts which they were considering were elective acts, and for that reason did not infringe Constitutional guaranties.

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Opinion of Justices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; Kentucky State Journal Co. v. Workmen's Compensation Bd. 161 Ky. 562, L.R.A. 1916A, 389, 170 S. W. 437, 1166, Ann. Cas. 1916B, 1273; Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720; Matheson v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A. 1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.

(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Shade v. Ash Grove Lime & Portland Cement Co. 93 Kan. 257, 144 Pac. 249.

Mr. W. V. Tanner, Attorney General of Washington, argued the cause and filed a brief for defendant in error:

Whether or not a state has ceased to be republican in form within the meaning of the Constitution of the United States is not a judicial question, but a political end, which is solely for Congress to determine.

Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Kiernan v. Portland, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231.

The guaranty that no person shall be deprived of life, liberty, or property without due process of law may be traced to the great charter, and was originally intended as a safeguard against the arbitrary and despotic exercise of executive power, and not against legislation. The same meaning was probably attached to it by the framers of our first Constitutions. Not that arbitrary acts depriving an individual of life, liberty, or property had never taken the form of statutes; Parliament, on the contrary, had frequently been made the instrument of despotism; but these abuses were guarded against by special constitutional prohibitions: the prohibition of acts of attainder, the provision that private property must not be taken for public use without compensation, and that the obligation of contracts must not be impaired. An act of legislation taking life, liberty, or property, and not covered by either of these clauses, was probably not thought of when the first Constitutions were framed. At the present time, however, the idea of due process is freely applied to legislation, and means with regard to it "conformity to the settled maxims of free government."

Freund, Pol. Power, § 20.

The limitations contained in the 14th Amendment to the Federal Constitution were not designed to limit or in any way interfere with the exercise of the state's police power.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; L'Mote v. New Orleans, 177 U. S. 587, 44 L. Ed. 899, 20 Sup. Ct. Rep. 788; Cunnius v. Reading School Dist. 198 U. S. 458-469, 49 L. ed. 1125-1130, 25 Sup. Ct. Rep 721, 3 Ann. Cas. 1121.

The police power has been variously defined.

License Cases, 5 How. 505, 12 L. ed. 256; Munn v. Illinois, 94 U. S. 113, 124, 24 L. ed. 77, 83; Crowley v. Christensen, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13; Camfield v. United States, 167 U. S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 864; Chicago, B & Q. R. Co. v. Illinois, 200 U. S. 561, 692, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The term "police power" has sometimes been used in a narrow sense, embracing merely regulations for the preservation of the order, peace, health, morals, and safety of the community. More recently, however, it has been extended to include all legislation looking to the well-being of society in its economic and intellectual aspects.

McGehee, Due Process of Law, p. 301.

The courts formerly, under different social, economic, and industrial conditions, emphasized the constitutional guaranty of the contractual freedom and strict property rights of the individual. Now the tendency is to give increased recognition to the limitations of that freedom which modern considerations of public welfare require.

Holden v. Hardy, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383.

The true criterion by which to determine whether any exercise of legislative power is violative of the due process of law clause is that of reasonableness as distinguished from arbitrary or capricious action.

Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; 547, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct Rep. 124; Hurtado v. California, 110 U.S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Twining v. New Jersey, 211 U. S. 78, 100, 53 L. ed. 97, 106, 29 Sup. Ct. Rep. 14, Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1275; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358., 3 Ann. Cas. 765; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Murphy v. California, 225 U. S. 623, 56 L. ed.

1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Welch V. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; McGehee, Due Process of Law, p. 306.

If the act under consideration has a legitimate and proper end, beneficial to the state, and does not arbitrarily or unduly oppress any person, then it is within the legislative power. Its purpose is to substitute for the old system of employer's liability (so many times the subject of legislative action) a newer and better system which shall place upon each industry a part of the burden of caring for the workmen and their dependents injured in that industry. Like every employers' liability act its main purpose is to keep the injured workmen from being a burden on society at large or on public charity. If that purpose is not an appropriate or proper one, then every act regulating employers' liability by increasing it is improper.

State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 195, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957.

In his opinion in Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062., 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, Holmes, J., regards "prevailing morality or strong and preponderant public opinion" as entitled to consideration in the determination of the question of the validity of social legislation.

The power of the legislature to abolish the doctrine of fellow servant is beyond question.

Jeffrey Mfg. Co. V. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Second Employers' Liability Cases (Mondon v. New York N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463.

The whole subject of contributory negligence is within the legislative power.

Jeffrey Mfg. Co. v. Blagg and Second Employers' Liability Cases supra; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

It is within the power of the legislature to abolish the defense of assumed risk.

Jeffrey Mfg. Co. v. Blagg and Second Employers' Liability Cases, supra.

In those states which have adopted the so-called "elective" workmen's compensation laws it is uniformly held that the legislature may abolish the defenses of (b) fellow servant, (c) contributory negligence, and (d) assumed risk.

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 39 L.R.A. 694, 97 N. E. 602, 1 N. C. C. A. 30; Deibeikis v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Opinion of Justices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Matheson v. Minneapolis Street R.

Co. 126 Minn. 286, L.R.A. 1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; Shade v. Ash Grove Lime & Portland Cement Co. 93 Kan. 257, 144 Pac. 249.

Liability may be imposed upon one who is in no manner at fault.

3 Select Essays on Anglo-American Legal History, pp. 474, 507, 509, et seq.; Castle v. Duryee, 2 Keyes, 169; Street Foundations of Legal Liability, pp. 52-59; Holmes v. Mather, L. R. 10 Exch. 261, 44 L. J. Exch. N. S. 176, 33 L. T. N. S. 361, 23 Week. Rep. 864; Stanley v. Powell [1891] 1 Q. B. 86, 60 L. J. Q. B. N. S. 52, 63 L. T. N. S. 809, 55 J. P. 327, 39 Week. Rep. 76.

See also The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; Curtis, Merchant Seamen, 106; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, 11 Mor. Min. Rep. 74; Rylands v. Fletcher, L. R. 3 H. L. 330, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Tonawanda R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239; Wells v. Howell, 19 Johns. 385; Noyes v. Colby, 30 N. H. 143; Wagner v. Bissell, 3 Iowa, 396; Union P. R. Co. v. Rollins, 5 Kan. 167; Sullivan v. Dunham, 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923, 7 Am. Neg. Cas. 126; Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123, 1 Am. Neg. Cas. 188; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L ed. 769, 13 Sup. Ct. Rep. 870; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 35 L.R.A.(N.S.) 1015, 127 N. W. 650, Ann. Cas. 1912C, 700; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Missouri P. R. Co. v. Humes, 115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Jones v. Brim, 165 U. S. 180, 41 L. ed.

677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349.

The act is not invalid unless it can be said that the imposition of the liability is arbitrary, or that the plan for distributing the burden is arbitrary. The plan of distributing the burden adopted in the Washington act, namely, the collection of premiums upon the pay roll of the workmen employed, is that adopted in every state in the Union having a similar law, and by every foreign country, so far as we have been able to ascertain. It is that adopted by insurance companies handling like risks, and is everywhere recognized as a proper insurance system. Certainly, if it is within the legislative power to impose liability without fault, and to distribute such liability among those within the terms of the act, the method of distribution adopted in this case must be held to be proper.

Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pa. 554, 1 N. C. C. A. 720; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; New York ex rel. New York Electric Lines v. Squire, 145 U. S. 175, 36 L. ed. 666, 12 Sup. Ct. Rep. 880; Consolidated Coal v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 624; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; McGlone v. Womack, 129 Ky. 274, 17 L.R.A.

(N.S.) 855, 111 S. W. 688; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Mitchell v. Williams, 27 Ind. 62; Van Horn v. People, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; Chicago v. Sturges, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349; Cole v. Hall, 103 Ill. 30; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459, Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676.

The act is valid as to the employee.

Kirby v. Pennsylvania R. Co. 76 Pa. 509; Martin v. Pittsburgh & L. E. R. Co. 203 U. S. 284, 295, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Middleton v. Fowler, 1 Salk. 282, 91 Eng. Reprint, 247; Cooley, Const. Lim. 6th ed. p. 437; Bl. Com. 431; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Harlow v. Humiston, 6 Cow. 189; Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 416, 54 L. ed. 1088, 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Templeton v. Linn County, 22 Or. 313, 15 L.R.A. 730, 29 Pac. 795; Williams v. Galveston, 41 Tex. Civ. App. 64, 90 S. W. 505; Sawyer v. El Paso & N. E. R. Co. 49 Tex. Civ. App. 106, 108 S. W. 718; Eastman v. Clackamas County, 32 Fed. 24; Bennet v. Hargus, 1 Neb. 419; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397.

The liberty of contract is not protected by the 14th Amendment against the rightful exercise of the police power of the state.

Hooper v. California, 155 U. S. 648, 658, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Booth v. Illinois, 184 U. S. 425, 428, 46 L. ed. 623, 625, 22

Sup. Ct. Rep. 425; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586; Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 56 L. ed. 175, 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Erie R. Co. v. Williams, 233 U. S. 685, 58 L ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 55, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Gundling v. Chicago, 177 U.S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by the state against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the state of Washington, to recover under chap. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay roll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act, based upon the Constitution of the United States. **[228]** The supreme court of Washington overruled them, and affirmed a judgment in favor of the state (75 Wash. 581, L.R.A. —, —, 135 Pac. 645, 4 N. C. C. A. 811), following its previous decision in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash.

156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; and the case comes here under § 237, Judicial Code (36 Stat at L. 1156, chap. 231. Comp. Stat. 1913, § 1214].

The act establishes a state fund for the compensation of workmen injured in hazardous employment abolishes except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sale source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The 1st section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and unfair; that the remedy of the workman has been uncertain, slow, and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen injured in extra hazardous work, and their families and dependents is hereby provides regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this **[229]** act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the

courts of the state over such causes are hereby abolished, except as in this provided."

The 2d section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous enumerates those intended to be embraced within the term "extra hazardous," including factories, mills, and workshops where machinery is used, printing, electrotyping, photoengraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works, logging, lumbering, and ship-building operations, logging, street, and interurban railroads, steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The 3d section contains a definition of terms, and, among them: "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ or, if death result from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury" [230] is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the 1st day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual pay roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½ per cent, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10 per cent, in the case of powder works. The same section establishes forty-seven different classes of industry, and declares: "For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one fourth of the premium of the next succeeding year, and one twelfth thereof at the close of each month after December, 1911: Provided, any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet [231] the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or

payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience.*[1] . . .

If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any [232] year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the

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[1] By Sess. Laws 1915, Chap. 188, pp. 674, 677, § 4 was amended so as to substitute in the place of the clause italicized the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any relative increase or decrease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and safely distribute the burden of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding $75 in any case, a monthly payment of $20 for the widow or invalid widower, to cease at remarriage, and $5 per mouth for each child under the age of sixteen years until that age is reached, but not exceeding $35 in all, with a lump sum of $240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of sixteen years, there is to be a monthly payment to each child until that age is reached, but not exceeding a total of $35 per month; if there be no widow, widower, or child under the age of sixteen years, other dependent relatives are to receive monthly payments equal to 50 per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of $20 per month. For permanent total disability of a workman, he is to receive, if unmarried, $20, or, if married, $25 per month, with $5 per month additional for each child under the age of sixteen years, but not exceeding $35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding $4,000, according to the expectancy [233] of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the

extent of the injury, but not exceeding $1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21, the Industrial Insurance Department is created, consisting of three commissioners. By § 20, a judicial review is given, in the nature of an appeal to the superior court, from any decision of the department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefits of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry, at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

[234] While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364,

368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in New York C. R. Co. v. White, decided this day [243 U.S. 188, ante, 667, 37 Sup. Ct. Rep. 247]. It is true that in the Washington act the state fund is the sole source from which the compensation shall be paid, whereas the New York act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state Commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of article 4 of the Constitution of the United States, guarantying to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. Luther v. Borden, 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; Pacific [235] States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; Kiernan v. Portland, 223 U. S. 151, 56 L. ed.

386, 32 Sup. Ct. Rep. 231; Marshall v. Dye, 231 U. S. 250, 256, 58 L. ed. 206, 207, 34 Sup. Ct. Rep. 92; Ohio ex rel. Davis v. Hildebrandt, 241 U. S. 565, 60 L ed. 1172, 36 Sup. Ct. Rep. 708.

The 7th Amendment, with its provision for preserving the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963, L.R.A.1917A, 86, 36 Sup. Ct. Rep. 595), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but, with respect to those, we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the 14th Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that, with respect to private occupations (including those of plaintiff in error), a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers, and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1 [236] in that year, actions pending and causes of action existing on September 3 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations in futuro.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in New York C. R. Co. v. White, 243 U. S. 188, ante, 667, 37 Sup. Ct. Rep. 247, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from responsibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the states are not prevented by the 14th Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall; that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not; so that,

however prudently one may manage his business, even to the point of immunity to his employees from accidental [237] injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the supreme court of Washington (75 Wash. 581, 583) sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the Clausen Case (65 Wash. 156, 203, 207), which was rested principally upon that power, but also (pp. 203, 207) sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized but upon its practical operation and effect. Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 268, 23 L. ed. 543, 547; Stockard v. Morgan, 185 U. S. 27, 36, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 28, 30, 54 L. ed. 355, 366, 367, 30 Sup. Ct. Rep. 190; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99. And the Federal Constitution does not require a separate exercise by the states of their powers of regulation and of taxation. Gundling v. Chicago, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 Sup. Ct. Rep. 633.

Whether this legislation be regarded as a mere exercise of power of regulation, or as a combination of regulation and

taxation, the crucial inquiry under the 14th Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of [**238**] its validity, and the burden of proof and argument is upon those who seek to overthrow it. Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499. "The police power of a state is as broad and plenary as its taxing power." Kidd v. Pearson, 128 U. S. 1, 26, 32 L. ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. In Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, the court, by Mr. Justice Field, said: "Neither the [14th] Amendment--broad and comprehensive as it is--nor any other Amendment, was designed to interfere with the power of the state sometimes termed its police power, to prescribe

regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,--[239] for supplying water, preventing fires, lighting districts, cleaning streets, opening, parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." It seems to us that the considerations to which we have adverted in New York C. R. Co. v. White, supra, as showing that the Workmen's Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the state of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that, in the ordinary course of things, frequently and inevitably produce

disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A [240] familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the state powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the supreme court of Washington said: "Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance oh his master's premises." Stertz v. Industrial Ins. Commission, 91 Wash. 588, 158 Pac. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the state powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the 14th Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has

been said. Taking the law, therefore, to be justified by the public nature of the object , whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be [241] so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question,--the distribution of the burden,--there is no criticism upon the act in its details. As we have seen, its 4th section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry cannot be deemed an arbitrary adjustment, in view of the legislative declaration that it is "deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." It is a matter of common knowledge that, in the practice of insurers, the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund, from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve,

the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that [242] the fund shall ultimately become neither more nor less than self-supporting, and that the rates are sufficient to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent try to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359. But further, the question whether any of the industries enumerated in § 4 are nonhazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident, there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification,--and there is none,--the evident purpose of the original act to classify the

various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

[243] There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the 14th Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the 1st section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in New York R. Co. v. White, the state is at liberty, notwithstanding the 14th Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in New York

C. R. Co. v. White, 243 U. S. 188, ante, 667, 37 Sup. Ct. Rep. 247, or by publicly administering [244] the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that, if charged to the industry, it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the state acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue, [245] proportioned to the special injury attributable to the activities taxed, is not novel. In Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the state an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation, but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the state. In Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140, and Kane v. New. Jersey, 242 U. S. 160, 169, ante, 222, 228, 37 Sup. Ct. Rep. 30, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure competition for the use of improved roadways from a class of users for whose needs they are essential, and whose operations over them are peculiarly injurious. And see Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 394, 395, 35 L. ed. 1051, 1054, 1055, 12 Sup. Ct. Rep. 255, and cases cited. Many of the states have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. Morey v. Brown, 42 N. H. 373, 375; Tenney v. Lenz, 16 Wis. 566; Mitchell v. Williams, 27 Ind. 62; Van Horn v. People, 46 Mich. 183, 185,

186, 41 Am. Rep. 159, 9 N. W. 246; Longyear v. Buck, 83 Mich. 236, 240, 10 L.R.A. 42, 47 N. W. 234; Cole v. Hall, 103 Ill. 30; Holst v. Roe, 39 Ohio St. 340, 344, 48 Am. Rep. 459; McGlone v. Womack, 129 Ky. 274, 283, et seq., 17 L.R.A.(N.S.) 855, 111 S. W. 688.

[246] We are unable to find that the act, in its general features, is in conflict with the 14th Amendment. Numerous objections are urged, founded upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (sic) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether, as thus construed, it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware, the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. Bachtel v. Wilson, 204 U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359.

Judgment affirmed.

The CHIEF JUSTICE, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.

[188] NEW YORK CENTRAL RAILROAD COMPANY, Plff. in Err.,

v.

SARAH WHITE.

(See S. C. Reporter's ed. 188-209.)

Master and Servant -- employers' liability -- when servant is engaged in interstate commerce.

1. A night watchman in the employ of a railway company, injured while in the performance of his duty to guard tools and materials intended to be used in the construction of a new railway station and new tracks, was not then engaged in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), although such station and tracks were designed for use, when finished, in interstate commerce.

[For other cases, see Master and Servant, II., in Digest Sup. Ct. 1908.]

Constitutional law -- workmen's compensation -- due process of law -- freedom of contract -- police power.

2. The compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316), which, in lieu of the common-law liability confined to cases of negligence, imposes a liability upon employers to make compensation for disabling or fatal accidental personal injuries received by employees in the course of their employment in certain gainful occupations denominated "hazardous employments," without regard to fault as a cause, except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty, graduating the compensation for disability according to a prescribed scale based upon loss of earning power, having

regard to the previous wage and the character and duration of the disability, and measuring the death benefits according to the dependency of the surviving wife, husband, or infant children, --does not contravene U. S. Const. 14th Amend., as taking property without due process of law, or unwarrantably limiting freedom of contract, whether considered from the standpoint of employer or employee, but is a valid exercise of the police power of the state.

[For other cases, see Constitutional Law, IV. b, 7; IV. c. 3, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- equal protection of the laws -- trial by jury

3. Trial by jury is not embraced in the rights secured by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. b. 7; IV. c. 3, in Digest Sup. Ct. 1908.]

Constitutional law -- equal protection of the laws -- Workmen's Compensation Act -- classification -- exemption of farm laborers and domestic servants.

4. The exclusion of farm laborers and domestic servants from the compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, chap. 816; Laws 1914, chaps. 41 and 316) is not such an arbitrary classification as to contravene the equal protection clause of the

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Note. -- On the constitutionality application, and effect of the Federal Employers' Liability Act--see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 88, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On Workmen's Compensation Acts--see notes to Milwaukee v. Miller, L.R.A.1916A, 23, and Linnane v. Aetna Brewing Co. L.R.A.1917D, 80.

On constitutionality of Workmen's Compensation and Industrial Insurance Statutes--see notes to Jensen v. Southern P. Co. L.R.A.1916A, 490, and Hunter v. Colfax Consol. Co L.R.A.1917D, 51.

U. S. Const. 14th Amend., since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law -- due process of law -- Workmen's Compensation Act -- method of securing payment.

5. The requirement of the New York Workmen's Compensation Act (N. Y. Laws 1913, 316), § 50, that the employer shall secure payment of the compulsory compensation prescribed by that act either by (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by furnishing satisfactory proof of his financial ability to pay the compensation, and depositing securities for that purpose, cannot be said to contravene U. S. Const. 14th Amend., since self-insurance under the third method presumably is open to all solvent employers on reasonable terms.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

[No. 320.]

Argued February 29 and March 1, 1916. Restored to docket for reargument November 13, 1916. Reargued February 1, 1917. Decided March 6, 1917.

IN ERROR to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, to review a judgment affirmed by the Court of Appeals of that state, which affirmed an award by the state Workmen's Compensation Commission. Affirmed.

See same case below, in appellate division, 169 App. Div. 903, 152 N. Y. Supp. 1149; in court of appeals, 216 N.Y. 653, 110 N. E. 1051.

The facts are stated in the opinion.

Messrs. Robert E. Whalen and William L. Visscher argued the cause on original argument, and, with Messrs. H. Leroy Austin and Frank V. Whiting, filed a brief for plaintiff in error:

White, when killed, was employed in interstate commerce by the railroad, which also was then engaging in interstate commerce.

(a) It must be conceded that this court has expressly left open for determination, when squarely presented, the question whether the construction of an uncompleted instrumentality, designed for use, when finished, in interstate commerce, brings a railroad and its employee upon such work within the provisions of the Federal act.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

(b) Two of the lower Federal courts have resolved the question in the negative.

Jackson v. Chicago, M. & St. P. R. Co. 210 Fed. 498; Bravis v. Chicago, M. & St. P. R. Co. 133 C. C. A. 228, 217 Fed. 236.

(c) Each case must be decided in the light of the particular facts, with the view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof.

New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 263, 264, 59 L. ed. 1298, 1300, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

(d) The true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it?

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 60 L. ed. 436, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188.

(e) In each of the following cases the nature of the work of the employee, when injured or killed, has been held to render the Federal act applicable:

A locomotive fireman walking to the place where he was to go on duty.

Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336.

A section hand riding to his camp at night after work.

San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870.

An employee engaged in building a new office in an old freight shed.

Eng. v. Southern P. Co. 210 Fed. 92.

An employee engaged in installing a block system to be used in signaling trains.

Grow v. Oregon Short Line Co. 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915B, 481.

A section hand asleep at night in a car on a sidetrack.

Sanders v. Charleston & W. C. R. Co. 97 S. C. 50, 81 S. E. 283.

An engineer at a station for pumping water to be used by engines engaged in interstate commerce.

Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897.

An employee assisting in the movement of water or coal to be consumed by engines used in interstate commerce.

Barker v. Kansas City M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151.

The New York Workmen's Compensation Law is revolutionary in its character.

Post v. Burger, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. 888; Ives v. South Buffalo R. Co.

201 N. Y. 285, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 401, 10 N. C. C. A. 1.

The liability which the statute imposes upon the employer depends upon no ground hitherto recognized in American jurisprudence as a basis of responsibility. It rests neither upon breach of contract nor upon omission to perform any duty prescribed by common or statute law. The liability exists even though the employer be wholly free from negligence, -- even though he has been guilty of no legal or ethical wrong, -- even though he has exercised the utmost diligence to guard against the occurrence of an accident which could not have been anticipated, and even though an employee may not only injure himself, through his own fault, but also cause injury or death to fellow employees for which the employee must pay compensation, and entail, furthermore, a large monetary loss to the employer through damage to property.

Ives v. South Buffalo R. Co. supra.

The economic considerations upon which such legislation is based are nothing else than socialistic.

Ibid.

Legislation of the character involved in the case at bar contravenes the due process clause of the 14th Amendment.

Ibid.; Middleton v. Texas Power & Light Co. -- Tex. Civ. App. --, 178 S. W. 956, 9 N. C. C. A. 847.

Without crossing constitutional bounds authoritatively marked by judicial decisions, a compulsory compensation act, irrespective of fault, cannot be sustained as a valid exercise of the police power.

Ives v. South Buffalo R. Co. 201 N. Y. 301, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; Cooley, Const. Lim. 6th ed. p. 208; People v. Morris, 13 Wend. 328.

Messrs. Frank V. Whiting and Robert E. Whalen argued the cause on reargument, and, with Messrs. William L. Visscher and H. Leroy Austin, filed a brief for plaintiffs in error:

Properly conceived, the unit of work decisive of White's employment was realignment of an interstate highway, because White was killed on duty by the operating hazard of such a highway. His work was an incident of the familiar activity of the normal growth of a railroad. It can only be regarded as new construction in the same sense that, as a result of such realignment and corrections of grade and reballasting and substitution of rail, the reconstruction or replacement of bridges, a new highway may be gradually evolved, suited to the requirements of the normal growth of interstate commerce. White was, therefore, it is urged, employed in interstate commerce at the time of his death, and this case comes within the exclusive jurisdiction of the Federal act.

Erie R. Co. v. Welsh, 212 U. S. 303, ante, 319, 37 Sup. Ct. Rep. 116; Pedersen v. Delaware, L & W. R. Co. 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 263, 59 L. ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Chicago, R. I. & P. R. Co. v. Industrial Board, 273 Ill. 528, L.R.A. 1916F, 540, 113 N. E. 80; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188.

Mr. Harold J. Hinman argued the cause on original argument, and, with Mr. E. Clarence Aiken and Mr. Egburt E. Woodbury, Attorney General of New York, filed a brief for defendant in error:

The deceased workman was not engaged in interstate work.

Petersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Bravis v. Chicago, M. & St. P. R. Co. 133 C. C. A. 228, 217 Fed. 234; Jackson v. Chicago, M. & St. P. R. Co. 210 Fed. 495; Thomas v. Boston & M. R. Co. 218 Fed. 143; Illinois C. R. Co. v. Rehrens, 233 U. S. 476, 58 L. ed. 1054, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153.

Mr. E. Clarence Aiken argued the cause on reargument for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that state,[1] to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the appellate **[191]** division of the supreme court for the third judicial department, whose order was affirmed by the court of appeals, without opinion. 169 App. Div. 903, 152 N. Y. Supp. 1149, 216 N. Y. 653, 110 N. E. 1051. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the appellate division, to which the record and proceedings had been remitted by the court of appeals. Sioux Remedy Co. v. Cope, 235 U. S. 197, 200, 59 L. ed. 193, 196, 35 Sup. Ct. Rep. 57.

[1]Chap. 816, Laws 1913, as re-enacted and amended by chap 41, Laws 1914, and amended by chap. 316, Laws 1914.

The errors specified are based upon these contentions: (1) that the liability, if any, of the railroad company for the death of Jacob White, is defined and limited exclusively by the provisions and limitations of the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were **[192]** designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is, "Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A. 1916C, 797, 36 Sup. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann.

Cas. 1914C, 153, 3 N. C. C. A. 779. And see Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; Raymond v. Chicago, M. & St. P. R. Co. this day decided [243 U. S. 43, ante, 583, 37 Sup. Ct. Rep. 268]. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely [193] from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be

necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death, the compensation is known as a death benefit, and includes funeral expenses, not exceeding $100, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. **[194]** Provision is made for the establishment of a Workmen's Compensation Commission[2] with administrative and judicial functions, including authority to pass upon claims to compensation upon notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the appellate division of the supreme court for the third department, with an ultimate appeal to the

[2] By chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

court of appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) "by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in § 13 of the Insurance Law, in an amount to be determined by the Commission, to secure his [**195**] liability to pay the compensation provided in this chapter." If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation

without regard to fault. Laws 1910, chap. 674. This was held by the court of appeals in Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517, to be invalid because in conflict with the due process of law provisions of the state Constitution and of the 14th Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all **[196]** other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, chap. 816), and in 1914 reenacted it (Laws 1914, chap. 41) to take effect as to payment

of compensation on July 1 in that year. The act was sustained by the court of appeals as not inconsistent with the 14th Amendment in Jensen v. Southern P. Co. 215 N. Y. 514, L.R.A. 1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the some time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such [197] agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay

required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer and cannot succeed without showing that its rights as such are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the court of appeals in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights [198] of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; Hurtado v. California, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 294, 61 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A.(N.S.)

44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep. 482.

The fault may be that of the employer himself, or--most frequently--that of another for whose conduct he is made responsible according to the maxim respondeat superior. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,--in disobedience, it may be, of the employer's positive and specific command,--the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's [**199**] negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are Murray v. South Carolina R. Co. (1841) 1 McMull. L. 385, 398, 36 M. Dec. 268; Farwell v. Boston & W. R. Corp. (1842)

4 Met. 49, 57, 38 Am Dec. 339, 15 Ma. Neg. Cas. 407; Hutchinson v. York, N. & B. R. Co. (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; Wigmore v. Jay (1850) L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; Bartonshill Coal Co. v. Reid (1858) 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107. And see Randall v. Baltimore & O. R. Co. 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Northern P. R. Co. v. Herbert, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 650-653, 58 L.R.A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk. Seaboard Air Line R. Co. v. Horton, 233 **[200]** U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct.

Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. ed. 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Minnesota Iron Co. v. Kline, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 53, 54 L.ed. 921, 928, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412;

Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 97, 54 L. ed 106, 111, 30 Sup. Ct. Rep. 21; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

[201] It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of

establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing [202] the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged that, in such an adjustment, the particular rules of the common law affecting the subject- matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment. Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's wilful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death

benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling [203] or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power, --a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense

that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while removing the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, [**204**] by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,– that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; Chicago R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

We have referred to the maxim, respondeat superior. In a well-known English case, Hall v. Smith, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore, 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be "bottomed on this principle, that he who expects to derive an advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. And this view has been adopted in New York. Cardot v. Barney, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration, [**205**] cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,--the primary cause, as it may be deemed,--and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for

the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed **[206]** by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property--partaking of the nature of each--is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." Truax v. Raich, 239 U. S. 33, 41, 60 L. ed. 131, 135, L.R.A. 1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and

that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state [207] must suffer." Holden v. Hardy, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383. It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable;" and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 571, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life

and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. Sherlock v. Alling, 93 U. S. 99, 103, 23 L. ed. 819, 820; Missouri P. R. Co. v. Castle, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th [208] Amendment. The denial of a trial by jury is not inconsistent with "due process." Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 960, 985, 35 Sup. Ct. Rep. 582.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 650, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the 14th Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose

the third method, and, with the sanction of the Commission, deposited securities to the amount of $300,000, under § 50, and $30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will [209] not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about $50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the 14th Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not

injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

IN THE SUPERIOR COURT OF WASHINGTON IN ADAMS COUNTY

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No.
VS.	)	SUPPLEMENTAL AFFIDAVIT
NESTLE FOOD COMPANY, Defendant.	)	OF PAUL E. MANOR

PAUL E. MANOR, under penalty of perjury, states as follows:

Since 1981, when Carnaco Transport, Inc. was incorporated, I have worked solely and exclusively for Carnaco Transport Inc. I have worked solely under the control of Carnaco management personnel. I have never consented to or actually worked under the control or direction of Nestle Food Company, their management or divisional operations. As a truck driver for Carnaco Transport, Inc., I have worked and been treated by Nestle Food Company as any other commercial cargo carrier operator.

I was injured on January 15, 1992 at the Carnation Processed Potato plant in Othello, Washington. I was injured by a Carnation forklift driver who backed up without looking or sounding his backup horn.

On January 15, 1992 my claim for State Industrial Insurance benefits was signed and submitted by me.

On January 26, 1992 I was flown to Sacred Heart Hospital in Spokane. I was diagnosed as having acute inflammatory polyradiculoneuropathy (Guillain-Barre syndrome). I became completely paralyzed and was in the intensive care unit until June 15, 1992. I was on a respirator with a tracheal tube until June 1, 1992. During much of that time, I did not know what was going on around me. My perception of reality was distorted. I was not aware of or

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ATTORNEYS, 704 E. OLIVE AVE.
MOSES LAKE, WA 98837 (509) 765-4451

involved in any of my personal business matters while I was in the hospital. With regard to my state industrial insurance claim, the only thing I knew was that my claim had been approved and my medical bills and time loss were being paid. I never saw an order allowing the claim, nor saw any checks issued for time loss while I was in the hospital.

On June 15, 1992, I was transferred to Samaritan Hospital in Moses Lake.

On September 10, 1992 I was transferred to St. Luke's Hospital in Spokane for intensive physical therapy.

I was finally released to go to my home in Moses Lake on November 20, 1992. At that time my body functions were still severely limited and I was reliant on my wife and physical therapists for assistance with basic living functions;

Since my state industrial claim was allowed, I have received time loss compensation checks. Those checks are issued by Scott Wetzel Services on preprinted Nestle Food Company checks. Each check is individually completed by printing my name, the amount, my claim number, and designates Carnaco Transport as the division and the Moses Lake as the local terminal to which the benefits are charged. A copy of the most recent check dated 12/28/93 is attached hereto.

/s/ Paul E. Manor

On this 13 day of January, 1994 personally appeared before me Paul E. Manor, who affirmed that he executed the foregoing document freely and voluntarily for the uses and purposes stated herein.

/s/ John Luke McKean
Notary public for the state of Washington, residing at Moses Lake. My commission expires 3/28/95.

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MOSES LAKE, WA 98837 (509) 765-4451

[Disability Check issued to Paul Manor]

[front of check]
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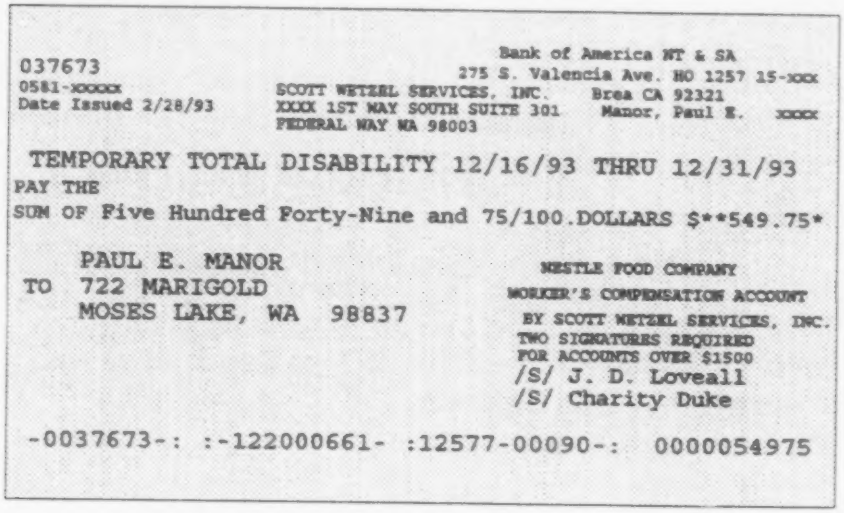

037673
0581-xxxxx
Date Issued 2/28/93

Bank of America NT & SA
275 S. Valencia Ave. HO 1257 15-xxx
Brea CA 92321

SCOTT WETZEL SERVICES, INC.
XXXX 1ST WAY SOUTH SUITE 301
FEDERAL WAY WA 98003

Manor, Paul E. xxxx

TEMPORARY TOTAL DISABILITY 12/16/93 THRU 12/31/93

PAY THE
SUM OF Five Hundred Forty-Nine and 75/100.DOLLARS $**549.75*

TO PAUL E. MANOR
722 MARIGOLD
MOSES LAKE, WA 98837

NESTLE FOOD COMPANY
WORKER'S COMPENSATION ACCOUNT
BY SCOTT WETZEL SERVICES, INC.
TWO SIGNATURES REQUIRED
FOR ACCOUNTS OVER $1500
/S/ J. D. Loveall
/S/ Charity Duke

-0037673-: :-122000661- :12577-00090-: 0000054975

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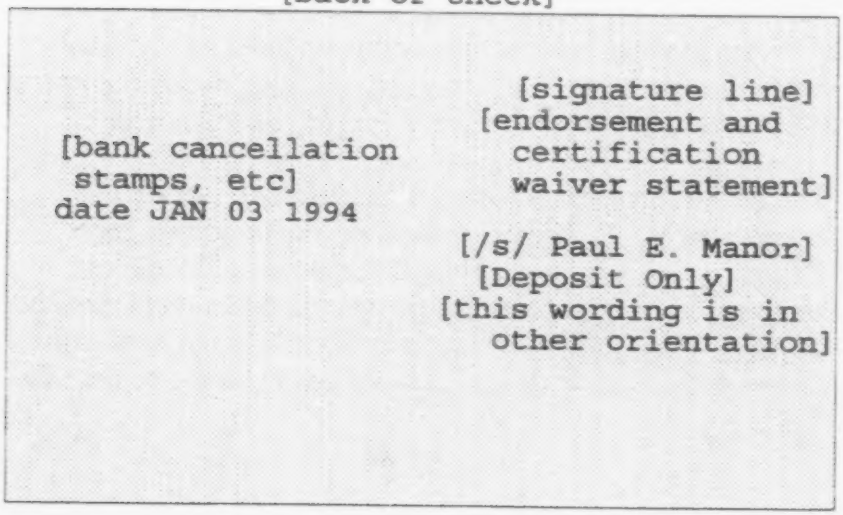

[bank cancellation stamps, etc]
date JAN 03 1994

[signature line]
[endorsement and certification waiver statement]

[/s/ Paul E. Manor]
[Deposit Only]
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SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

PAUL E. MANOR & LYNETTE MANOR, husband and wife, Plaintiffs,	)	No.
vs.	)	AFFIDAVIT OF JOHN HOBSON
NESTLE FOOD COMPANY, Defendant.	)	

JOHN HOBSON, under penalty of perjury, states as follows:

I reside in Moses Lake, Washington and was employed by Carnaco Transport, Inc. for a period of sixteen years. I have been employed in the trucking business for twenty-five years. I was hired in November, 1974 as a truck driver with Midwest Motors. In November, 1977 I was promoted to Assistant Manager of the Carnaco Transport, Inc. terminal which was then located in Warden, Washington. In 1981 I was promoted to Manager of the Moses Lake terminal. I served in that position through September, 1990.

Each terminal or local office of Carnaco Transport, Inc. was treated as an individual cost center. As Manager, I was provided monthly Income Statements produced by Carnaco's financial department. All costs and operating expenses incurred by each terminal were charged to that terminals expense accounting, and also to the account of Carnaco Transport, Inc. The Income Statements included the following income and expense items: 1) income credited as freight charges for Carnation Company and affiliated corporations, 2) Income received for freight charges other than Carnation intracorporate hauling, 3) All operating expenses charged to the local Moses Lake Carnaco terminal, 4) All labor costs charged to the Moses

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Lake Carnaco terminal, 5) Labor and Industry / Workman's Compensation costs attributable to the Moses Lake Carnaco terminal and its employees, 6) All overhead cost allocations and taxes attributable to the Moses Lake terminal.

I was also provided a year end annual Income Statement. The costs incurred and the income generated by each Carnaco terminal were closely monitored by the corporate headquarters. Terminal Managers were held responsible for control of costs and resulting profit margins.

I was responsible for filing monthly Labor and Industry forms for the Moses Lake Carnaco terminal showing the total hours worked by employees. I also was required to report any work-related accidents and give a description of the nature of the accident and injury. I also filed quarterly Labor and Industries reports. These reports were sent to the corporate headquarters in Los Angeles.

My paychecks and those for all management employees were issued through the Carnation Company corporate headquarters in Los Angeles, and were issued as Carnation Company checks. These payroll checks were then credited back by the Carnation Company financial department as salary expenses of Carnaco Transport, Inc.

/s/ John Hobson

On this 4 day of January, 1994 personally appeared before me John Hobson, who affirmed that he executed the foregoing document freely and voluntarily for the uses and purposes stated herein.

/s/ John Luke McKean
Notary public for the state of Washington, residing at Moses Lake. My commission expires 3/28/95.

McKEAN LAW OFFICE
ATTORNEYS
704 E. OLIVE AVE.
MOSES LAKE, WA 98837
(509) 765-4451

[state seal]
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Affidavit of Joyce Edwards

State of Washington)
)
County of Thurston)

JOYCE EDWARDS, being first duly sworn upon oath, deposes and says:

I an employed by the Department of Labor and Industries in the Self-Insured Section as a Worker's Compensation Adjudicator. I was asked to review claim file T396715 and to advise of the process of the allowance of this claim and the responsible employer assigned to this claim.

Mr. Manor worked as a truck driver for Carnaco Transport which is a subsidiary of Nestle Food Company. He injured his left foot on January 15, 1992. He filed claim number T396715 on January 16, 1992 with the Terminal Manager at Carnaco Transport in Moses Lake.

This claim was forwarded and received by Scott Wetzel Services, the third party administrator which processes the claims for Nestle Food Company, on January 30, 1992. Scott Wetzel Services forwarded the Self-Insurer's Accident Report (SIF-2), the Physician' s Initial Report, and the Initial SIF-5 to the Department on February 4, 1992. This action is how the self-insured employer requests claim allowance.

The department received this claim on February 7, 1992. An order allowing this claim was issued February 14, 1992. There was no protest or appeal to this decision and the claim allowance is final and binding.

/s/ Joyce Edwards

SUBSCRIBED AND SWORN to before me the 4th day of January, 1994.

/s/ Cherie Mae Wagaman
NOTARY PUBLIC in and for the State of Washington, residing at Olympia

[NOTE: 10 copies of page, 8-1/2" x 11", lodged]

[transcription of form]
[As far as possible, information filled in is provided.]
[Not possible to reproduce printing on form in size required.]

[WASHINGTON STATE SEAL] SELF INSURER ACCIDENT REPORT
WORKER START HERE (SIF-2) T 396715
ALL questions below must be answered . . .
. . . U.B.I # 409 000 899 CLASS 402
. . . Paul E. Manor 765 9004
. . . 722 Marigold 587-34-4882
. . . Moses Lake WA 98837 765-9441
...6'3" 260 Lynette K. Manor Truck Driver M 1-23-38
Crushed foot Left foot 1/15/92 9:30 a.m.
Standing on dock waiting to load. Left foot was run over by a forklift.
CSLTOor Fred Garcia(?) Carnaco Transport, Moses Lake WA
1-15-92 16 yrs yes other
Yes Carnation Co., Othello WA Adams
Del Gridley, Supervisor 1/15/92
No No
Dr. Brown, 660 Coolidge Dr. #105, Moses Lake WA 1-16-92
Samaritan Hosp /s/ Paul E. Manor
Moses Lake /s/ Paul E. Manor
EMPLOYER START HERE
Yes 6:00 am - 5:00 pm No
5 No No $ 8.50 hour
Yes [Scott Wetzel Svc Received stamp dtd Jan 30, 1992]
No 1-15-92
I DECLARE . . . FOREGOING STATEMENTS TRUE . . .
1/20/92 /s/ Kenneth S. Mesein(?), Terminal manager
Carnation Transport
11958 Wheeler Road Moses Lake WA 98827

[Transcription of Form]

[As far as possible, information filled in is provided.]

PHYSICIANS INITIAL REPORT

MAIL TO SELF INSURED COMPANY

Name of self-insured employer	Patient Information
Carnaco	Paul E Manor 765 9004
11958 Wheeler Rd	722 Marigold 537-34-4882
Moses Lake WA 98837	Moses Lake WA 98837 1-23-38
Scott Wetzel Services	1-15-92 9:30 a.m.
Federal Way WA	Waiting to load and forklift ran over left foot
	/s/ Paul E. Manor 1/15/92

Physician - START HERE

17. DATE PATIENT FIRST SEEN BY YOU FOR THIS INJURY CONDITION

1/15/92

ICDM-9 CODE 825.20 L foot multiple fxs and abrasions
917

ARE THERE OBJECTIVE FINDINGS TO SUPPORT THIS DIAGNOSIS

Yes. laceration dorsum 4th toe, eccymosis over dorsum foot

Referred for Diagnostic Studies (Xray) YES. L toe.

Referred for Diagnostic Studies (Lab) NO.

20. Answer to the best of your knowledge:
   a. Has worker ever been treated for present or similar condition? NO
   b. Is there any pre-existing impairment of the area injured? [not ans.]
   c. Will any pre-existing condition complicate treatment . . .? NO
   d. Is the condition diagnosed the result of the . . .? YES

21. Treatment Provided/Ordered, Type [all boxes checked NO]

22. Can this worker return to regular work? NO

23. Referred to:
   Doyle Brown, M.D., 600 Coolidge
   Moses Lake WA 98832 Phone 766-1970[?]

Licensed physician must sign before report is accepted.

/s/ Jim L. Hutchison, M.D.

488-6644 1/16/92

Jim L. Hutchison, M.D.

475 N. 14th

Othello WA 99344

L & I Acct #: 60705 IRS Acct #: 91-1030784

[Transcription of Form]
[As far as possible, information filled in is provided.]

SI REPORT ON OCCUPATIONAL INJURY OR DISEASE SIF-5

Employer: Nestle' Food Company UBI: 409000899
Account IO: 700,247-00-0 Claim No.: T396715
Initial: On the date first time loss is paid
Service Co.: Scott Wetzel Services, Inc.

ALL INFORMATION MUST BE COMPLETED
Claimant: Paul E. Manor Address: 722 Marigold
Moses Lake, WA 98837
Date of Injury: 1/15/92 Marital Status: Married
Number of qualified dependents: 000
Last day worked: 1/15/92 Date of first payment: 20492
Claim arrival date: 1/30/92 Date returned to work: NYR
Date released for work: NYR
Date first treated: 1/15/92
Compensation paid:
1/16/92 through 1/31/92, 32.41 per 16 days
totaling $ 518.56
Total of days paid: 16 Total paid: $518.56
Is condition medically fixed? Unknown
Is there permanent impairment? Unknown
Attending physician: Rockwood Clinic, 400 E. 5th Ave.,
Spokane, WA 99220
Has claimant returned to same employer? NYR
Has time loss exceeded 90 days? No.
E.A.R. approval date: N/A

[received stamp, Feb - 7 1992
L & I Mailroom]

PRVDR HUTCHISON JIM L MD
FOURTEENTH AVE MED CTR
475 N 14TH AVE
OTHELLO WA 99544

STATE OF WASHINGTON
DEPT. OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504
SELF INSURED

EMP NESTLE FOOD COMPANY CLAIM ID : T396715 TYPE : AS
C/O SCOTT WETZEL SVC INC
35801 1ST WAY S STE 301 MAILING DATE 02-14-92 WRKPOS : SI 72
PO BOX 9706
FEDERAL WAY WA 99063-9706 INJURY DATE 01-15-92 UNIT : S
CLMT PAUL E MANOR SERVICE LOCATION : EPHRATA
722 MARIGOLD UBI : 409 000 899
MOSES LAKE WA 99837 ACCOUNT ID : 700,247-00
CLASS : 4002
WORK LOCATION ADDRESS:
NESTLE FOOD COMPANY
11958 WHEELER ROAD
MOSES LAKE WA 98837

NOTICE OF DECISION

THE CLAIMANT NAMED HEREIN HAS FILED A CLAIM FOR WORKERS' COMPENSATION BENEFITS WITH THE SELF-INSURED EMPLOYER NAMED HEREIN. THE DEPARTMENT OF LABOR AND INDUSTRIES HAS BEEN REQUESTED TO ISSUE A DETERMINATIVE ORDER. THE DEPARTMENT'S ORDER IS SET FORTH AT THE BOTTOM OF THIS PAGE. ANY PROTEST OR REQUEST FOR RECONSIDERATION ON THIS ORDER MUST BE MADE IN WRITING TO THE DEPARTMENT OF LABOR AND INDUSTRIES IN OLYMPIA WITHIN 10 DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A REQUEST. ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL.

WHEREAS, THE ABOVE NAMED WORKER SUSTAINED AN INJURY WHILE IN THE COURSE OF EMPLOYMENT WITH A SELF-INSURED EMPLOYER, AND

WHEREAS, PAYMENT OF TIME LOSS COMPENSATION BY THE SELF-INSURED EMPLOYER HAS BEEN REPORTED IN ACCORDANCE WITH WAC 296-15-070;

IT IS HEREBY ORDERED THAT THIS CLAIM BE ALLOWED FOR MEDICAL TREATMENT AND SUCH OTHER BENEFITS AS MAY BE AUTHORIZED OR REQUIRED BY LAW.

THIS IS A FORMAL ORDER TO THE EFFECT.

SUPERVISOR OF INDUSTRIAL INSURANCE
BY TINA GOFORTH
CLAIMS REP, SELF INS

FILE COPY

A-130

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No. 93-2-00044-1
vs.	)	AFFIDAVIT OF
NESTLE FOOD COMPANY, Defendant.	)	MALCOLM C. EWING

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Malcolm C. Ewing, being first duly sworn on oath, does depose and state:

1. That I am the Assistant Corporate Secretary of Nestle Food Company (formerly Carnation Company). As such, I am familiar with and competent to testify about the corporate structure of Carnation Company and the relationship between Carnation Company and its subsidiaries. I have responsibility for Nestle Food Company and its subsidiary companies' corporate books.

2. That on June 4, 1991, Carnation Company filed a Restated Certificate of Incorporation, renaming it Nestle Food Company. A copy of this Restated Certificate is attached as Exhibit A to this Affidavit.

3. Prior to, on, and after August 2, 1989, Carnaco Transport, Inc. was a wholly-owned subsidiary of Carnation Company.

DATED this 7th day of July,1993.

/s/ Malcolm C. Ewing

Subscribed and sworn to before me this 7th day of July, 1993.

/s/ Suzanna E. Arady
Notary Public in and for the State of California. My commission expires 7/26/96.

[notary seal, Suzanna E. Arady]

Exhibit C

SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs, vs. NESTLE FOOD COMPANY, Defendant.	NO. 93-2-00044-1 MEMORANDUM RE: EMPLOYMENT / MOTION TO DISMISS

STATEMENT OF FACTS

Paul Manor, plaintiff, was hired by Midwest Motors November, 1975 as a truck driver. Paul had worked full time as a truck driver since 1963.

Midwest Motors was incorporated as Carnaco Transport, Inc. in 1981. After that time the trucks carried the Carnaco Transport, Inc. logo. The Moses Lake Carnaco Transport, Inc. office/shop moved to its present location outside Moses Lake five years ago. The Moses Lake facility is more than two miles removed from the Wheeler Carnation Processed Potato plant. In May, 1992, Carnaco Transport, Inc. changed its name to Nestle Transportation, Inc. Prior to June, 1992, the facility had a large "Carnaco Transport, Inc." sign on the building facing the roadway.

There are presently about 18 to 22 semi tractors based at the Moses Lake office/shop, all of which are owned or leased by Nestle Transportation Company. Carnaco Transport, Inc. negotiated a separate contract with the Teamsters' Union Local 760 and the drivers" pension plans are provided for through that contract. Carnaco Transport, Inc. had its own cargo and general liability insurance coverage. Based on discovery provided by Defendant, Nestle Transportation carried private insurance coverage in its name for worker's compensation liability during 1993. Answers to Interrogatories indicate that Nestle Food Company carried private insurance to cover any worker's compensation liability in excess of $300,000.00 in 1992.

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Accounting of debits and credits on the account of Carnaco Transport, Inc. was kept at the corporate headquarters of Nestle Holdings, Inc. / Nestle USA, Inc. in Los Angeles. Carnaco Transport, Inc. billed Carnation / Nestle Food Company for freight charges based on state and interstate tariff rates. Billings for services, as well as accounts payable and payroll for the Moses Lake office were submitted to the head Carnaco administrative office at Oconomowoc, Wisconsin.

The Moses Lake office of Carnaco Transport, Inc. provided trucking services for the Moses Lake and Othello Carnation Processed Potato plants. However, Carnaco provided only about 30% of the trucking services used by those plants. In addition, most of the hauling of frozen product from storage to distributors and retailers was done by owner/operators under contract with Carnaco.

Carnaco Transport, Inc. owned or leased, insured and maintained its own trucks. Drivers were hired by Carnaco and worked exclusively for Carnaco. Carnaco Transportation is authorized as a common carrier or contract carrier in at least 13 states.

Paul Manor's work was directed and controlled by the Carnaco Transport, Inc. dispatcher and operations supervisor Del Gridley. Paul was assigned a specific truck which he drove unless it was in the shop for repairs. Carnaco mechanics serviced and repaired the Carnaco trucks at the shop adjoining the Carnaco office. The extent to which Nestle Food Company no more than what any regular shipping customer would exert over a contract or common carrier.

On October 25, 1993, Depositions were taken of Kenneth Meservy, terminal manager for Nestle Transportation Company over Moses Lake, Pasco, and Nampa Idaho operations and employed for two years; Delmar Gridley, Operation supervisor for the Moses Lake office of Nestle Transportation Company and employed since February, 1976,

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Alfredo Alvarado, driver for Carnaco since October, 1974; Howard Moore, driver for Carnaco Transport for eighteen years; and Terry Cafferty, driver for Carnaco Transport, Inc. for seventeen years. Each of those employees were asked if they presently were employed or worked for Nestle Transportation Company and if they were employed or worked for Carnaco Transport, Inc. prior to the name change. Each one answered yes without qualification.

In the Self-Insurer Accident Report completed by Paul Manor on 1/16/92, filed as Exhibit A to Defendant's Memorandum of Authorities in Support of Motion To Dismiss, Paul Manor stated that his employer was Carnaco Transport of Moses Lake and that the injury occurred at Carnation Company in Othello, WA.

On the Employment Eligibility Verification Form I-9 completed on 12/12/91, one month before Paul's injury, Del Gridley listed Paul Manor's employer as Carnaco Transport.

APPLICABLE LAW

Fisher v. Seattle and Standard Oil Co., 62 W.2d 800, 384 P.2d 852 (1963).

Action for injuries received by employee. The Superior Court, King County, Eugene A. Wright, J., granted summary judgment for one defendant and employee appealed. The Supreme Court, Hunter, J., held that, in absence of indication that employee . . . in any way consented to employer-employee relationship with one defendant, Workmen's Compensation Act afforded no immunity to that Defendant, although by agreement between corporations known employer of employee was agent of such defendant.

. . . The plaintiff was hired by Standard Stations, Inc. (Standard Stations herein) as a service station attendant for a station located in the city of Seattle. While in the act of opening the station early one morning, he turned on a switch controlling the oil burner and was injured in an explosion and

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fire which then occurred. The explosion and fire were caused by the igniting of gases which had generated and accumulated on an adjoining garbage and refuse dump and fill maintained by the city of Seattle. The plaintiff alleges his injuries occurred because of the negligence of the city of Seattle and Standard Oil Company of California, Western Operations, Inc. (Western Operations herein) in permitting the gas to enter the building.

Standard Oil Company of California (Standard of California herein), Western Operations, and Standard Stations are three separate corporations. The latter two are wholly owned subsidiaries of the former. In 1953, Standard of California and Standard Stations entered into an agreement whereby the latter, for a monthly fee of $1,250, undertook to employ station personnel, to operate designated stations, to keep such books and records as required by Standard of California, and to receive and turn over money from operations when requested. Standard of California agreed to furnish all other needed personnel and to provide sufficient funds for station operations and personnel.

In 1956, Standard of California and Western Operations entered into a management agreement whereby the latter undertook, for a monthly fee of $10,000, to manage and operate substantially all of the former's physical properties, businesses, and associated services. Shortly thereafter, these three corporations agreed that all rights and obligations of Standard of California should be performed by Western Operations and that thereafter Standard Stations should look to that corporation in all respects in connection with the 1953 agreement.

The plaintiff set forth in an affidavit that, because he was hired and paid by Standard Stations, he was led to believe that only Standard Stations was his employer. He further stated that he was never informed he was working for Western Operations, that he knew nothing of the agreements between the three corporations, and that he did not know that Western Operations prepared Standard Stations' paychecks and paid

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industrial insurance premiums for Standard Stations' employees.

Subsequent to the serving and filing of the plaintiff's complaint and Western Operations' answer, Western Operations moved for summary judgment. The plaintiff then made a cross motion for summary judgment for the purpose of striking Western Operations' affirmative defense that the plaintiff's action was barred by the Workmen's Compensation Act. The trial court denied the plaintiff's motion and granted Western Operations' motion on the basis that, by reason of the agency relationship existing between the three corporations, the plaintiff was an employee of Western Operations. From the entry of an order pursuant to this determination, the plaintiff appeals. . . .

The plaintiff contends that, since he was hired by Standard Stations and since he had no knowledge of its relation to Western Operations, Standard Stations only is his employer. He argues that disclosure of this relationship is necessary otherwise the essential element of consent to his employment is missing.

Western Operations, on the other hand, contends that, by reason of the agreements between the three corporations, Standard Stations is its agent, and therefore the employment of the plaintiff by its agent, Standard Stations, created an employer-employee relationship between the plaintiff and Standard Stations' principal, Western Operations. In support of its position that Standard Stations was its agent, Western Operations has directed our attention to the complete dominion and control which it retained over the work being done by Standard Stations. It contends it is immaterial whether the plaintiff had knowledge of the relationships involved.

[2] Under workmen's compensation law, however, the spotlight focuses on the employee, i. e., the servant, rather than on the employer, i.e., the master. The important question, here, is: Did the workman consent with the 'employer' to the status of 'employee'? Unlike the common law, compensation law demands that, in order to find an employer-employee

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relation, a mutual agreement must exist between the employer and employee.

Regarding the necessity of such an agreement in cases involving workmen's compensation issues as compared to cases involving issues of vicarious liability, 1 Larson, Workmen's Compensation Law Sec. 47.10 (1952) states:

> '* * * The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a stranger. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the stranger's injury? If he did, it is of no particular importance between him and the stranger whether the servant enjoyed any reciprocal or contractual rights vis-a-vis the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master of [*sic.*] even know who he is.
>
> 'Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has

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never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the riaht to sue his own employer for common law damages.' . . .

[4] The reasoning in the 'lent servant' situation is applicable to the present case. In these situations, it is a well-established rule that an employee cannot have an employer thrust upon him against his will or without his knowledge. Barney v. Anderson, 116 Wash. 352, 199 P. 452 (1921); 3 Schneider, Workmen's Compensation Text (Perm.ed.) Sec. 782.

> 'Servant lent or hired to another. The general servant of one person may be lent to, and become the servant of, another by submitting himself to the direction and control of the other with respect to a particular transaction or piece of work * * *. However, such a relation between the borrower and the servant is not established unless it aupears that the servant has expressly, or by implication, consented to the transfer of his services to the new master, and unless the lender surrenders and the borrower assumes the power of supervision and control.' 56 C.J.S. Master and Servant Sec. 2d (2). (Italics ours.)

In discussing the requirement that there be consent by an employee to a change in employment relations, Justice Cardozo, in Murray v. Union Ry. Co. of New York City, 229 N.Y. 110, 127 N.E. 907 (1920), stated:

> '* * * We do not doubt that the same man may be in the general employment of one master and the special employment of another. [Citations omitted.] But employment, like any other contract, presupposes understanding. The new

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> relation cannot be thrust upon the servant without knowledge or consent. [Citations omitted.] He must understand that he is submitting himself to the control of a new master. We are not concerned at the moment with cases in which the rights of third persons are involved. We speak of cases where the parties to the disputed relation are the parties to the controversy. Understanding may be inferred from circumstances, but understanding there must be. Common-law rights and remedies are not lost by stumbling unawares into a new contractual relation. There can be no unwitting transfer from one service to another.'

Also, see 1 Larson, Workmen's Compensation Law Sec. 48.10 (1952); Stroud v. Zuzich, 271 S.W.2d 549 (Mo., 1954); Quick v. Allegheny Const. Equipment Co., 361 Pa. 377, 65 A.2d 238 (1949); Crawford v. Duluth, Missabe & Iron Range Ry. Co., 220 Minn. 225, 19 N.W.2d 384 (1945).

We hold that, in cases involving the issue whether under Washington's Workmen's compensation laws there is an employer-employee relation, such a relation cannot exist without the consent of the workman.

[5] The plaintiff, in the instant case, filed an affidavit stating he had no knowledge of the agreements or relation between Standard Stations and Western Operations; [384 P.2d 856] he believed his employer to be Standard Stations only. There is no indication in the record, that he, in any was [*sic.*], consented to an employee relationship with Western Operations. Thus, trial court erred in granting summary judgment to Western Operations and in denying the plaintiff's motion for summary judgment made for the purpose of striking western Operations' affirmative defense.

Davis v. Early Const. Co., 63 Wn.2d 252, 386 P.2d 958, (Wash. 1966)

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Defendant next contends the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict, because, defendant asserts, the evidence conclusively and without dispute establishes that, as a matter of law, the lift operator became the loaned servant of B & B. Thus, defendant argues, plaintiff's third party negligence action under RCW 51.24.010 fails, and defendant is immune from suit, or, in any event, is exonerated of vicarious liability. Plaintiff, just as vehemently, argues that the evidence established, as a matter of law, that the lift operator was at all times the employee of defendant. . . .

[6] It is essential, then, to place the parties to the instant case in proper perspective. It is undisputed that plaintiff, at the time of the injury, was an employee of B & B. It is not contended that plaintiff was a loaned servant of defendant. Defendant admittedly was the general (as distinguished from the special) employer of the lift operator and the owner of the lift equipment. Plaintiff--not the lift operator--is seeking redress against defendant as a third party tort-feasor. Defendant, as a third party tort-feasor, is not afforded immunity under the Workmen's Compensation Act. The burden of establishing the essentials of defendant's vicarious liability is upon plaintiff. The burden of avoiding liability upon the basis of the loaned servant doctrine is upon defendant. Clark v. Bohemian Breweries, Inc., 7 Wash.2d 487, 110 P.2d 197.

The question presented by this assignment, then, turns upon the applicability of the loaned servant doctrine rather than upon the interpretation of and the immunity provided by RCW 51.24.010. The issue is vicarious liability, not statutory immunity.

The spotlight thus focuses primarily upon the two employers--the business in which each are respectively engaged, work being performed at the time of the accident

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and its relationship to the business of the respective employers, the terms and nature of their agreement, the necessity for special equipment, the ownership, operation, and protection of such equipment, the need for and employment of the operator, the right of control over the equipment and operator, and such other surrounding factors as throw light upon the employment relationship. Generally speaking, a factual issue is presented. Restatement, Agency (2d) Sec. 227, p. 500.

[7] We have in a number of cases (FN2) considered the loaned servant doctrine with varying results, dependent upon the factual pattern. In Macale v. Lynch, 110 Wash. 444, 448, 188 P. 517, we state the general rule which we have applied:

> '* * * It is, of course, well-settled law that one who is in the general [386 P.2d 962] employ and pay of one person may be loaned or hired, by his employer to another, and, when he undertakes to do the work of the other he becomes the servant of such other, to perform the particular transaction Standard Oil Co. v. Anderson, 212 U.S. 215, 29 Sup.Ct. 252, 53 L.Ed. 480; Olsen v. Veness, 105 Wash. 599, 178 Pac. 822. The controlling facts in these cases, and in all others which support the rule, is that the servant must have been in the exclusive control of the one to whom he is loaned, and, if so, such servant becomes pro hac vice the servant of him to whom the exclusive control so passes, and not otherwise. * * *'

Apropos to our conclusion, upon the factual pattern presented, is our statement in the Macale case, supra, p. 448 of 110 Wash., p. 518 of 188 P.:

> '* * * In the case at bar, the evidence fails to establish that the driver, Nolan (the lift operator in the instant case], was, at the time of the

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> accident, in the exclusive control and direction of Barnes (B & B in the instant case], with that clearness and certainty necessary to enable us to say as a matter of law that he was then the servant of Barnes, and not the servant of appellant defendant in the instant case]. * * *'

By the same token, we cannot say, as a matter of law, that the lift operator remained the servant of the defendant. A question of fact was presented. The trial court did not err in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

Marsland v. Bullitt Company, 71 Wn.2d 343, 428 P.2d 586, (Wash. 1967)

The trial court granted summary judgment of dismissal of the plaintiffs' action against the Bullitt Company; largely on the theory that Bullitt Comoany was an 'employer' of the plaintiffs under the Washington Industrial Insurance Act and immunized from an action at law for damages. The plaintiffs appeal.

The plaintiffs first contend the trial court erred in holding that the defendant, Bullitt Company, was the plaintiffs' 'employer' within the meaning of RCW 51.08.070 and had an employer's immunity from suit. We agree. . . .

In the number of cases where we have considered this definition, we have consistently held that a person is not an 'employer' unless the parties are in the relationship of employer and employee, a consensual relationship involving the consent of both persons. Fisher v. City of Seattle, 62 Wash.2d 800, 806, 384 P.2d 652 (1963); and cases cited.

> Respondent's argument is that, because the respondent would have been obligated to pay the industrial insurance and medical aid premiums of its subcontractor, appellant's employer, in the event of premium default by

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the subcontractor, it is, in effect, the employer itself and is immune from suit by an employee of its subcontractor.

We decide otherwise. (1) There was no default; (2) respondent was not the appellant's employer; and (3) the default contingency, which is negatived by the uncontroverted facts, does not change the situation. Respondent is a third party, not appellant's employer who alone is immune. Greenleaf v. Puget Sound Bridge and Dredging Co., 58 W.2d 647, 364 P.2d 796 (1961).

Novenson v. Spokane Culvert and Fabricating Co., 91 Wn.2d 550, 588 P.2d 1174

This appeal certified to this court from the Court of Appeals, Division Three, involves a claim arising from an industrial accident. The trial court granted defendant's motion for summary judgment. We reverse.

In July 1975, plaintiff/appellant Joseph Novenson moved to the Spokane area from Pennsylvania. He was to begin working as the assistant chaplain at the Whitworth Campus Ministry in September.

On July 24, 1975, Novenson went to the offices of Kelly Labor of Northwest, Inc. in response to a newspaper advertisement for temporary laborers. He sought part-time employment for the 4- to 6-week period prior to assuming his position at Whitworth. Novenson signed the requisite forms at Kelly and was dispatched to a customer of Kelly, defendant/ respondent Spokane Culvert and Fabricating Company. He was assigned to work on the "culvert rolling" machine.

The following day, Novenson returned to Kelly and was reassigned to Spokane Culvert at his request. Kelly would issue Novenson a paycheck for each day's work at Spokane Culvert

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at the hourly rate of $2.10. During his third day of work at Spokane Culvert, both of appellant's hands were drawn into the rollers of the culvert rolling machine and were severely crushed.

As a Kelly employee, Novenson received benefits under the Washington industrial insurance act, RCW Title 51. He brought this action against Spokane Culvert alleging negligence in failing to: provide a safe workplace; provide safety devices on the culvert rolling machine; properly train and supervise Kelly laborers in the operation of machines; and provide other adequate safety precautions. The trial court granted Spokane Culvert's motion for summary judgment, concluding as a matter of law that appellant was an employee of Spokane Culvert, thus limited in recovery to benefits under the industrial insurance act.

The industrial insurance act declares that all civil actions and causes of action for personal injuries of workmen against their employers are abolished, except as otherwise provided in the title. RCW 51.04.010. RCW 51.24.010 provides such an exception, permitting those workmen injured by the negligence of one "not in the same employ" to elect to seek a remedy against the tort-feasor. We note at the outset that in Lunday v. Department of Labor & Indus., 200 Wash. 620, 94 P.2d 744 (1939), the act was so construed as to permit a worker to be concurrently the employee of a general employer and at the same time the employee of a special employer. Without that construction the workman would have been unable to receive benefits under the industrial insurance act. The issue in the present case is whether an employee-employer relationship existed between Novenson and Spokane Culvert. The trial court concluded, as a matter of law, that such a relationship existed. We disagree.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable

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inferences therefrom most favorably to the nonmoving party, Joe Novenson. If reasonable persons "might reach different conclusions the motion should be denied." Balise v. Underwood, 62 Wash.2d 195, 199, 381 P.2d 966, 969 (1963).

[1] Kelly is in the business of providing casual labor to customers who need temporary workers. Kelly, as an employer, must of course, do all those things every employer is required to do, such as employee reporting, payment of industrial insurance premiums, internal revenue withholding, and general bookkeeping and accounting concerning these daily laborers. Kelly has an employer number with the Department of Labor and Industries and is a single employer entity for workmen's compensation purposes. Kelly charges its customers, such as Spokane Culvert, for the services of its employees. The fact that such charges include the industrial insurance premiums paid to the Department of Labor and Industries is, we find, of no moment in the present inquiry. The fees charged by any contractor normally cover its costs of doing business and would include such an expense. . . .

[2][3][4] For purposes of workmen's compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship. Marsland v. Bullitt Co., 71 Wash.2d 343, 428 P.2d 586 (1967); Fisher v. Seattle, 62 Wash.2d 800, 384 P.2d 852 (1963). The right of control is not the single determinative factor in Washington. A mutual agreement must exist between the employee and employer to establish an employee-employer relationship. Unlike the rules of vicarious liability at common law which focused on whether the "master" accepted and controlled the activities of the "servant" under the workmen's compensation law, the focus is upon the employee or "servant". The necessity of a mutual agreement was emphasized in Fisher v. Seattle, supra at 804-05, 384 P.2d at 854:

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> "Under workmen's compensation law, however, the spotlight focuses on the employee, i.e., the servant, rather than on the employer, i.e., the master. The important question, here, is: Did the workman consent with the "employer" to the status of "employee"? Unlike the common law, compensation law demands that, in order to find an employer-employee relation, a mutual agreement must exist between the employer and employee. . . .
>
> When the party asserting the existence of an implied employment relation is not an employee seeking statutory compensation, but an employer seeking a defense to a common law suit, different social values are at stake. In the former situation, if an employment agreement is established, moderate statutory benefits are available to the injured worker; however, reaching such a conclusion in the second situation results in the destruction of valuable common law rights to the injured workman. 1B A. Larson, Workmen's Compensation Law ss 47.42(a), 48.10 (1978). Consent to an employment agreement with Spokane Culvert should not be imputed to Novenson as a matter of law; material factual questions exist regarding the plaintiff's consent to enter a contract of hire. . . .
>
> [5] For whatever reason, Spokane Culvert found it advantageous to contract with Kelly to provide it with temporary workers. As opposed to permanent employees of Spokane Culvert, Kelly laborers were not placed on its payroll, nor were they eligible for company benefits. Spokane Culvert seeks the best of two worlds minimum wage laborers not on its payroll, and also protection under the workmen's compensation act as though such laborers were its own employees. Having chosen to garner the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume the burdens. A potential burden, in this instance, may well be the application of RCW 51.24.010, which permits a

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common law action for negligence.
Reversed and remanded.

Smick v. Burnup & Sims, 35 Wn.App. 276, 666 P.2d 926, (1983)

Skyler Smick appeals a summary judgment dismissing his complaint or personal injuries against Burnup & Sims. In granting summary judgment, the court ruled as a matter of law that since Mr. Smick was an employee of Burnup & Sims, his action was barred by the workers' compensation act. The sole question on appeal is whether Mr. Smick's employee status presented a question of material fact. We reverse and remand for trial. . . .

[1] Mr. Smick contends the granting of summary judgment was error. He argues that the requisite elements for finding an employment contract in this case, i.e., right of control and consent to the employment relationship and burdens of employment, present a question of fact for the jury. We agree.

[2] For purposes of workers' compensation, a two-prong test has been judicially created to determine when an employment relationship exists. First, an employer must have the right to control the servant's physical conduct in the performance of his duties. Novenson v. Spokane Culvert & Fabricating Co., 91 Wash.2d 550, 553, 588 P.2d 1174 (1979). This is consistent with the loaned servant doctrine which requires the borrower to have exclusive control over the employee in order for an employment relationship to exist. Anerican Sign & Indicator Corp. v. State, 93 Wash.2d 427, 434, 610 P.2d 353 (1980); Anderson v. Red & White Constr. Co., 4 Wash.App. 534, 540, 483 P.2d 124 (1971); Pichler v.Pacific Mechanical Constructors, 1 Wash.App. 447, 450, 462 P.2d 960 (1969).

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The second prong requires consent by the employee to the relationship. Novenson v. [666 P.2d 928] Spokane Culvert & Fabricating Co., supra at 553, 588 P.2d 1174; 1 Marsland v. Bullitt Co., 71 Wash.2d 343, 345, 428 P.2d 586 (1967). The focus is on the employee rather than the employer. Fisher v. Seattle, 62 Wash.2d 800, 804, 384 P.2d 852 (1963). The important question to be asked in determining whether this prong is satisfied is: "Did the workman consent with the 'employer' to the status of 'employee'?" Fisher v. Seattle, supra at 804, 384 P.2d 852. A person cannot have an employer thrust upon him against his will. Fisher v. Seattle, supra at 805, 384 P.2d 852. . . .

[3] Whether both prongs are satisfied is a question of fact and neither should be imputed as a matter of law. In Novenson, at page 555, 588 P.2d 1174, the evidence presented a much stronger case for an employer-employee relationship than here, but the court reversed a summary judgment and remanded the issues for trial stating:

> The trier of fact at trial is the one to draw any inferences as to Novenson's understanding and consent vis-a-vis an employment relationship with Spokane Culvert.

Other decisions also hold that "right of control" presents an issue of fact. American Sign & Indicator Corp. v. State, supra at 434, 610 P.2d 353; Nyman v. MacRae Bros. Constr. Co., 69 Wash.2d 285, 288, 418 P.2d 253 (1966); Erickson Paving Co. v. Yardley Drilling Co., 7 Wash.App. 681, 686, 502 P.2d 334 (1972); Anderson v. Red & White Constr. Co., supra at 539, 483 P.2d 124; Pichler v. Pacific Mechanical Constructors, supra at 450, 462 P.2d 960.

Considering all the evidence presented and all reasonable inferences therefrom in favor of Mr. Smick, Bernethy v. Walt Failor's, Inc., 97 Wash.2d 929, 932, 653 P.2d 280 (1982), we hold a question of fact exists as to whether

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there was an employment relationship between Mr. Smick and Burnup & Sims.

Meads v. Ray C. Roberts Post 969, Inc., 54 Wn.App. 486, 774 P.2d 49, (Wash.App 1989)

Genia Meads was injured when she fell down a flight of stairs at her place of employment as a bartender. She appeals summary judgment dismissing her negligence claim against Ray C. Roberts Post 969, Inc., owner of the building. The Post convinced the trial judge that it was Mead's employer as defined in RCW 51.08.070, and thus was immune from her suit under the Industrial Insurance Act, although she actually worked for a separate corporation, The Ray C. Roberts Service Club, Inc. The Post argued essentially that the Service Club corporation was a subsidiary of and completely controlled by the Post, and that, ipso facto, this made Meads the Post's employee. The trial court agreed; we do not. We reverse.

Here, the Post advances two contentions in support of its position. First, asserting that it has ultimate financial responsibility for payment of industrial insurance premiums for Service Club corporation employees, it argues that this burden under the Act entitles it to an employer's benefits of the Act, including immunity from suit by employees. Second, it contends that Corr v. Willamette Indus., Inc., 105 Wash.2d 217, 713 P.2d 92 (1986), holds that an employee of a parent corporation's wholly owned subsidiary ipso facto is an employee of the parent, by virtue of the parent's right to control the subsidiary.

Meads contends that employer immunity is conferred only after it has been established that (1) the putative employer has the right to control the employee, and (2) the employee has consented to the employment relationship. Meads argues that summary judgment was improper because questions of fact remain concerning these elements. We agree with Meads.

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Glass v. Stahl Specialty Co., 97 Wash.2d 880, 652 P.2d 948 (1982), is representative [774 P.2d 50] of cases offered by the Post in support of its "burden-benefit" argument. However, the sole issue in Stahl was whether an employer could be liable for contribution, pursuant to RCW 4.22.040, at the behest of an equipment manufacturer against whom an action had been brought by an employee of the employer. Stahl does not help the Post. To the contrary, the same argument was rejected in Marsland v. Bullitt Co., 71 Wash.2d 343, 428 P.2d 586 (1967).

Corr does not support the Post's "parent-subsidiary ipso-facto" argument, nor does any other Washington case. In Corr, an employee sued a corporation, known and acknowledged to be his employer, for injuries allegedly caused by the employer's equipment. The equipment was manufactured by the corporate predecessor of the employer; the predecessor had been merged into the employer-corporation. The Corr court considered and rejected a "dual capacity" argument, and held that the "dual persona" doctrine did not apply on the facts. The court went no further.

Washington law on the issue of employer immunity is firmly settled and has been consistently applied. Notwithstanding a putative employer's claim of the right to control, immunity does not exist unless it can also be shown that the employee consented to the employment relationship. Fisher v. Seattle, Wash.2d 800, 384 P.2d 852 (1963). Thus, a 2-part test, right to control plus employee consent, applies. Novenson v. Spokane Culvert & Fabricating Co., 91 Wash.2d 550, 588 P.2d 1174 (1979). Both elements involve questions of fact. Smick v. Burnup & Sims, 35 Wash.App. 276, 666 P.2d 926 (1983). We are satisfied from the record before us that both elements present triable fact issues in this case.

Jones v. Halvorson-Berg, 69 Wn.App. 117, 847 P.2d 945, (Wash.App. Div. 3, 1993). . .

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LOANED SERVANT

[1] The trial court decided as a matter of law, after hearing arguments concerning lack of consent and right to control, that Mr. Jones was not Flour City's "loaned servant" and that Washington workers' compensation law did not bar his pursuit of a common law remedy against Flour City. Flour City contends this was a factual issue for the jury. Normally the determination of "loaned servant" status is a factual issue. Nyman v. MacRae Bros. Constr. Co., 69 Wash.2d 285, 288, 418 P.2d 253 (1966). A trial court ray not rule as a matter of law on it this issue if "substantial evidence [exists] in the record upon which reasonable minds could differ". Nyman, at 288, 418 P.2d 253; see also Erickson Paving Co. v. Yardley Drilling Co., 7 Wash.App. 681, 686, 502 P.2d 334 (1972).

> An employee may become the loaned servant of another "by submitting himself to the direction and control of the other with respect to a particular transaction or piece of work. . . <u>However, such a relation between the borrower and the servant is not established unless it appears that the servant has expressly, or by implication, consented to the transfer of his services to the new master</u>, and unless the lender surrenders and the borrower assumes the power of supervision and control." Fisher v. Seattle, 62 Wash.2d 800, 805, 384 P.2d 852 (1963)

quoting 56 C.J.C., Master and Servant Sec. 2(d)(2)); see also Novenson v. Spokane Culvert & Fabricating Co., 91 Wash.2d 550, 553, 588 P.2d 1174 (1979). (FN2) Restatement (Second) of Agency Sec. 227, comments a and c (1958) are in accord. . .

The rule that parent corporations, as a separate entity, are not immune from third party liability under Workmen's Compensation Acts to the employee of a subsidiary corporation is widely held and applied in other states.

see: "Workers' Compensation Immunity - Shareholder, 30 ALR4th 948 attached. **A-151**

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DISCUSSION

The Defendant urges the following: Nestle Food Company is immune from suit for the injury caused by the negligence of its employee because (a) the Plaintiff, Paul Manor was employed by a wholly owred subsidiary, (b) though a licensed, registered and insured corporation operating under a Washington Utilities and Transportation Commission Permit, Carnaco Transport, Inc. was not registered with the Department of Labor and Industry as a self insured employer, (c) Nestle Food Company or Nestle Holdings, Inc., its parent corporation had arranged for any workers' compensation claim made by a Carnaco Transport, Inc. employee to be handled under the account of Nestle Food Company and (d) Nestle Food Company has paid the benefits to which Paul Manor was entitled under the Industrial Insurance Act (e) IPSO FACTO Paul Manor is an employee of Nestle Food Company and barred from suing them for their negligence.

That proposition has not been accepted in any Washington case and is against the great weight of authority in other jurisdictions. I quote the manner in which that argument has been received by the courts of this state.

> "Kelly charges its customers, such as Spokane Culvert, for the services of its employees. The fact that such charges include the industrial insurance premiums paid to the Department of Labor and Industries is, we find, of no moment in the present inquiry. The fees charged by any contractor normally cover its costs of doing business and would include such an expense. . . .
>
> Spokane Culvert seeks the best of two worlds minimum wage laborers not on its payroll, and also protection under the workmen's compensation act as though such laborers were its own employees. Having chosen to garner

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the benefits of conducting business in this manner, it is not unreasonable to require Spokane Culvert to assume the burdens. A potential burden, in this instance, may well be the application of RCW 51.24.010, which permits a common law action for negligence." Novenson v. Spokane Culvert and Fabricating Co., 91 Wn.2d 550, 588 P.2d 1174.

"Respondent is a third party, not appellant's employer who alone is immune." Greenleaf v. Puget Sound Bridge and Dredging Co., 58 Wash.2d 647, 364 P.2d 796 (1961).

"The Post argued essentially that the Service Club corporation was a subsidiary of and completely controlled by the Post, and that, ipso facto, this made Meads the Post's employee. . . .

Here, the Post advances two contentions in support of its position. First, asserting that it has ultimate financial responsibility for payment of industrial insurance premiums for Service Club corporation employees, it argues that this burden under the Act entitles it to an employer's benefits of the Act, including immunity from suit by employees. Second, it contends that Corr v. Willamette Indus., Inc., 105 Wash.2d 217, 713 P.2d 92 (1986), holds that an employee of a parent corporation's wholly owned subsidiary ipso facto is an employee of the parent, by virtue of the parent's right to control the subsidiary.

Glass v. Stahl Specialty Co., 97 Wash.2d 880, 652 P.2d 948 (1982), is representative of cases offered by the Post in

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support of its "burden-benefit" argument. . . . Stahl does not help the Post. To the contrary, the same argument was rejected in Marsland v. Bullitt Co., 71 Wash.2d 343, 428 P.2d 586 (1967).

Corr does not support the Post's "parent-subsidiary ipso-facto" argument, nor does any other Washington case."

The issue raised by the Motion to Dismiss is not a factor considered by the courts in determining when a defendant is an "employer" for purposes of immunity under RCW 51.04.010. The evidence is overwhelming that Paul Manor was an employee of Carnaco Transport, Inc. for purposes of RCW 51.24.030(1) and was not an employee of Nestle Food Company. The question of employment is a question of fact for the trier of fact. Consequently, the Motion to Dismiss should be dismissed.

DATED this 11 day of November, 1993.

/s/ John Luke McKean
Attorney for Plaintiff
WSBA #13294

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BEFORE THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No. 93-2-00044-1
vs.	)	AFFIDAVIT OF
NESTLE FOOD COMPANY, Defendant.	)	LARRY WILKINSON
STATE OF WASHINGTON	)	
COUNTY OF THURSTON	)	

Larry Wilkinson, being first duly sworn on oath, does depose and state:

1. That I am employed as a Senior Surety Analyst for the Washington State Department of Labor and Industries, Self-Insurance Section. In that capacity, I am familiar with the self-insurance certification of employers in this state. I have reviewed the files of the Department of Labor and Industries, which show that Nestle Food Company is a registered self-insured employer in the State of Washington with a self-insurance account identification number of 700,247. Carnaco Transport is a subsidiary of Nestle Food Company, and for Department of Labor and Industries purposes its employees are employees of Nestle Food Company and receive workers' compensation benefits from Nestle Food Company under its registration as a self-insured employer in the State of Washington.

2. Carnaco is not independently certified or registered as a self-insured employer.

DATED this 13th day of July, 1993.

/s/ Larry Wilkinson

Subscribed and sworn to before me this 13th day of July, 1993.

/s/ Janete Nieman

[notary seal of Janete C. Nieman] NOTARY PUBLIC in and for the State of Washington. My commission expires 11/30/96.

[Washington State Seal]
STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
SELF-INSURANCE,CERTIFICATION SERVICES
724 QUINCE ST. PO BOX 44891, OLYMPIA WA 98504-4891
Affidavit of Larry J. Wilkinson

State of Washington)
County of Thurston)

LARRY J. WILKINSON, being first duly sworn upon oath, deposes and says:

I am employed by the Department of Labor & Industries in the Self-Insurance Section as a Senior Surety Analyst. I was asked by Luke McKean to respond to questions regarding the inclusion of Carnaco Transport under the self-insurance certification of Nestle Food Company.

Carnaco Transport was a subsidiary of Carnation Company which was granted authority to self-insure its workers' compensation liabilities in the state of Washington effective July 1, 1979. In 1991, Carnation was acquired by Nestle and the self-insurance certification was transferred to Nestle. This included the self-insurance of the subsidiary operation, Carnaco Transport.

RCW 51.14.010 requires that every employer secure the payment of compensation under this title by insuring with the state industrial insurance fund or qualifying as a self-insured employer.

RCW 51.14.020(1) stipulates that an employer must satisfy the Director that it has sufficient financial ability to pay all compensation due under that title before certification will be granted. Carnation and its successor, Nestle have demonstrated this ability.

WAC 296-15-060 (2 & 3) provide that the self-insured employer must pay a quarterly administrative assessment based on a percentage of payments on all claims involving the self-insured employer.

WAC 296-15-023 requires that the certification of a self-insured employer will include all subsidiaries and divisions doing business in the state of Washington.
One certificate will be issued to an approved self-insurer, which will include all of its subsidiaries and divisions. The policy of the Department is to prohibit selective certification where some risks are allowed to self-insure and others would be insured by the state industrial insurance fund.

/s/ Larry J. Wilkinson

SUBSCRIBED AND SWORN to before me the 7th day of January, 1994.

/s/ Cherie Mae Wagaman
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

PAUL E. MANOR & LYNETTE MANOR, husband and wife, Plaintiffs, vs. NESTLE FOOD COMPANY, Defendant.	No. 93-2-00044-1 DECLARATION RE DOCUMENTS RE: EMPLOYMENT

John Luke McKean, hereby affirms that the attached documents are true and correct copies of answers and documents provided to Plaintiff by Defendant in response to Plaintiff's First Discovery Requests.

1. Answers to Interrogatories #12 and 17.
2. Statement re Nestle Food Company.
3. Statement re Nestle Transportation Company.
4. Underwriters at Lloyd's, London Verification of Insurance.
5. Accord Certificate of Insurance.
6. Nestle USA, Inc. letter re: Conpensated Intercorporate Hauling Notice.
7. Employment Eligibility Verification (Form I-9)
8. Washington Utilities and Transportation Commission Permit

Dated this 12 day of November, 1993.

/s/ John Luke McKean
Attorney for Plaintiffs
WSBA #13294

12. INTERROGATORY: Do any insurance or indemnification policies exist that may satisfy part or all of a judgment that may be entered in this action; or to indemnify or reimburse for payments made to satisfy such judgment? If so, please state as to each insurance agreement or policy its complete contents, including:

a. Name, address and telephone number of insurer or indemnitor;

b. Name, address and telephone number of each named insured or indemnitee;

c. Each type of coverage provided;

d. Limits of each type of coverage provided;

e. Amount of deductible on each coverage;

f. Policy period coverage;

g. Policy number.

RESPONSE:

Yes, Nestle Food Company has an excess insurance policy which applies to claims exceeding Nestle Food Company's $3000,000.00 self-insured retention.

(a) Insurer:
General Reinsurance Corp.
Financial Centre
P.O. Box 10350
Stamford, CT 06904-2350

(b) Named insured:
Nestle Food Company
800 North Brand Blvd
Glendale, CA 91203
(818) 549-6000

(c) Coverage provided: Excess Workers' Conpensation and Employer's Liability

(d) Limits: Workers' Comensation - statutory
Employer's Liability - $1MM

(e) Deductible: $300,000.00 self-insured retention

(f) Policy period: January 1, 1992 through October 1, 1992

(g) Policy number X-14031

13. REQUEST FOR PRODUCTION: Please produce all insurance and indemnification agreements identified in response to the preceding interrogatory, (including all declaration pages, endorsements and amendments) in force at the time of the incident.

RESPONSE:

We are gathering this material and will supply a copy when we have the policy number X-14031.

14. INTERROGATORY: Have any of the insurers or indemnitors identified in your response to the preceding interrogatories denied in whole or in part coverage or indemnification for any of plaintiff's claims, or accepted defense of this action upon a reservation of rights? If so, please state as to each:

a. Name, address and telephone number of the insurer or indemnitor;

b. Contract language upon which the insurer or indemnitor bases its denial of coverage, indemnification or reservation of rights;

c. Reasons for the insurer's or indemnitor's denial of coverage, indemnification or reservation of rights.

RESPONSE: *No.*

15. INTERROGATORY: Does any oral or written agreement exist which requires any party to obtain approval prior to entering a settlement, or which in any way limits any party's ability to enter a settlement? If so, please identify all parties to each such agreement and state in detail the terms of the agreement.

RESPONSE:

Under an agreement between Scott Wetzel Services (SWS) and Nestle Food Company (NFC), SWS must

obtain NFC's consent to settle any claim in excess of $5,000.00. However, this applies only to workers' compensation claims.

16. REQUEST FOR PRODUCTION: Please produce for inspection and copying all documents identified in response to the preceding interrogatory.

RESPONSE:

N/A see answer to Interrogatory No. 15.

17. INTERROGATORY: Do any oral or written agreements exist allocating or apportioning responsibility for payment of any settlement or judgment that may be made or entered in this action? If so, please identify all parties to each such agreement, state in detail the terms of the agreement, and state the date the agreement was made.

RESPONSE:

Under an agreement with General Reinsurance corporation, beginning January 1, 1992. Nestle Food Company's insurance coverage applies only after a $300,000.00 self-insured retention has been satisfied by Nestle Food Company.

18. REQUEST FOR PRODUCTION: Please produce for inspection and copying all documents identified in response to the preceding Interrogatory.

RESPONSE:

See our response to Interrogatory No. 13.

ATTACHMENT A

NESTLE FOOD COMPANY

F.I.N. #95-1572209

INCORPORATION DATA:

State of Incorporation:Delaware Date of Incorporation:5/21/1920

Acquisition Date: 1/30/85

ADDRESS OF PRINCIPAL OFFICE: 800 N. Brand Blvd.
Glendale, Califoria 91203

PRINCIPAL ACTIVITY: Active X Inactive

Processing and sale of food products.

DIRECTORS: See Following Page

OFFICERS: See Following Page

CAPITALIZATION:

Shares Authorized 1,000 CMN	Shares Issued 1,000 CMN
$1.00 par value	$ 1.00 par value

SHAREHOLDER(S): Nestle Holdings, Inc.

ANNUAL MEETING: As determined by the Directors.

FISCAL YEAR END: 52 or 53 week year ending on Saturday nearest December 31.

STATES WHERE QUALIFIED (DATE): See Following Page

MISCELLANEOUS DATA:

Name Change History:

Originally incorporated as "Carnation Milk Products Company", the company changed its name to "Carnation Company" on November 1, 1929 and to "Nestle Food Company" on May 1, 1991.

Mergers/Liquidations/Dissolutions Involving Company (date)

See Following Page

Other Information

The company also does business as "Nestle Distribution Company" in California; "Broadcast Food Products" in the states of Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont; "Perugina Shoppes" in New York; and "Perugina Chocolate and Confections" in the states of Delaware and New Jersey.

NESTLE FOOD COMPANY
F.I.N. #95-1572209

STATES WHERE QUALIFIED (DATE):

Alabama	1/02/37	Nebraska	1/02/37
Alaska	10/09/85	Nevada	3/27/50
Arizona	1/14/47	New Hampshire	8/30/76
Arkansas	1/02/36	New Jersey	1/04/37
California	12/31/35	New Mexico	4/28/80
Colorado	11/21/60	New York	1/02/37
Connecticut	3/26/74	North Carolina	1/02/37
Delaware	5/21/20	North Dakota	1/15/80
Florida	1/05/37	Ohio	6/29/36
Georgia	1/08/37	Oklahoma	7/15/68
Hawaii	12/27/60	Oregon	7/09/20
Idaho	7/14/20	Pennsylvania	9/14/33
Illinois	1/04/36	Rhode Island	11/19/73
Indiana	6/01/37	South Carolina	1/02/37
Iowa	4/17/22	South Dakota	12/26/79
Kansas	3/09/48	Tennessee	9/25/33
Kentucky	7/23/28	Texas	12/23/36
Louisiana	1/05/37	Utah	12/21/38
Maine	12/06/37	Vermont	3/06/74
Maryland	9/25/39	Virginia	6/11/37
Massachusetts	1/09/37	Washington	7/08/20
Michigan	7/13/20	West Virginia	1/02/37
Minnesota	3/30/37	Wisconsin	7/13/20
Mississippi	1/24/27	Wyoming	12/17/79
Missouri	1/07/36	Puerto Rico	2/11/60
Montana	10/02/46	District of Columbia	6/06/55

NESTLE FOOD COMPANY

F.I.N. #95-1572209

DIRECTORS: Timm F. Crull,
Joseph M. Weller, Anthony J. Martino, Robert W. Schult

OFFICERS:

Robert W. Schult	President & C.E.O.
John H. Hubbell	Senior Vice President
Robert W. Mason	Sr.V.Pres., Manufacturing
John R. Mulhem	Sr.V.P., Finance & Treas.
Frank J. Arthofer	Vice President
Richard D. Baillie	V.P.,Technological Services
Hans Baumann	V.P., Engineering
Timothy G. Bnier	Vice President
N. Paul Devereaux	Vice President
James L. Dintaman	Vice President
James P. Gagliarducci	Vice President
John Giegerich	Vice President
John J. Harris	Vice President
Fred t. Hull	Vice President
Robert A. Iverson	Vice President
Gordon D, James	Vice President
Kimberly A. Lund	V.P.,Contr-F.& Asst.Treas.
John L. McMennamin	Vice President
Richard H. Ramage	Vice President
Robert H. Sanders	Vice President
Mark Sarvary	Vice President
Lynnville W. Smith	Vice President
Henry Snapper	Vice President
Emest L. Strapazon	Vice President
Jarnes P. Walsh	Vice President
J. Douglas Wyatt	Secretary
Malcolm C. Ewing	Assistant Secretary
Eric Bredeson	Assistant Treasurer
Thomas W. Heithaus	Assistant Treasurer
Kenneth L. Jalen	Assistant Treasurer
E. Simon Jones	Assistant Treas-Taxes
Alexander Spitzer	Assistant Treas-Taxes

NESTLE FOOD COMPANY
F.I.N. #95-1572209

Mergers/Liquidations/Dissolutions Involving Company (date):

Nestle Food Company (then known as Carnation Company) became a wholly owned subsidiary of Nestle Holdings, Inc. on 1/30/85. In 1986 the company was a wholly owned subsidiary of Camation Company Holdings, Inc. and on 6/30/90, the company became a wholly owned subsidiary of Nestle Holdings, Inc.

The following companies were merged into Nestle Food Company effective as of December 28, 1991:

Nest Properties, Inc., a California corporation
Nestle Chocolate & Confection Company, Inc., a New York corporation
Perugina Shoppes, Inc., a New York corporation
NFC Holdings, Inc., a Delaware corporation
Bolton Industries, Inc., a Delaware corporation
Perugina Chocolate and Confections, Inc., a Delaware corporation
Libby's Fresh Food Company, Inc., a Delaware corporation
Libby International Sales, Inc., a Delaware corporation
Nestle Beich, Inc., an Illinois corporation

The following companies were liquidated and dissolved effective as of December 28, 1991 and the assets of such companies were ultimately liquidated into Nestle Food Company:

BNC Corporation, a Delaware corporation
BNNC Corporation, a Delaware corporation
BNCC Corporation, a Delaware corporation
BNCI Corporation, a Delaware corporation

Licasco, Inc., a Delaware corporation, was liquidated and dissolved on March 9, 1992 and the assets of the company were liquidated into Nestle Food Company.

100 Manhattanville Road Corporation, a New York corporation, was merged into Nestle Food Company on May 7, 1992.

NESTLE TRANSPORTATION COMPANY
F.I.N. #95-3671194

INCORPORATION DATA:
State of Incorp.: Delaware Date of Incorp.: 1/22/1981
Acquisition Date:
ADDRESS OF PRINCIPAL OFFICE: 800 N. Brand Blvd.
Glendale California 91203
PRINCIPAL ACTIVITY: Active X Inactive
Freight Transportation
DIRECTORS: See Following Page
OFFICERS: See Following Page
CAPITALIZATION:

Shares Authorized	100 Common	$1.00 Par Value
Shares Issued	100 Common	$1.00 Par Value

SHAREHOLDER(S): Nestlé Food Company
ANNUAL MEETING: As determined by the Directors
FISCAL YEAR END: 52 or 53 week year ending on Saturday nearest to the last day of December.
STATES WHERE QUALIFIED (DATE):
DE (01/22/81) CA (11/05/86) ID (03/20/89) IL (10/29/82)
IN (02/28/83) MO (02/14/83) NY (11/17/87) OH (08/18/92)
PA (03/07/83) TX (02/13/87) VA (02/01/91) WA (04/09/85)
WI (03/02/83)

MISCELLANEOUS DATA:

Name Change History: Originally incorporated as "Carnation Transportation Company", the corporation changed its name to Carnaco Transport, Inc. on June 22, 1981 and on May 19, 1992, the company's namewas changed to its present styling.

Mergers/Liquidations/Dissolutions Involving Company (date): Yolo Transport Co., Inc. was merged into the company on April 1, 1992.

Other Information: Interstate Commerce Commission regulated company.

NESTLE TRANSPORTATION COMPANY
F.I.N. #95-3671194

DIRECTORS:

Mario A. Corti
Robert A. Iverson

OFFICERS:

Robert A. Iverson	President
Mario A. Corti	Vice President
N. Paul Devereaux	Vice President
Robert W. McCracken	Vice President
Stephen T. Michaels	Vice President
John R. Mulhern	Vice President and Treasurer
Robert H. Sanders	Vice President
Kimberly A. Lund	Assistant Treasurer
Thomas W. Heithaus	Assistant Treasurer
Kenneth L. Jalen	Assistant Treasurer
J. Douglas Wyatt	Secretary
Malcolm C. Ewing	Assistant Secretary
E. Simon Jones	Assistant Treasurer - Taxes
Alexander Spitzer	Assistant Treasurer - Taxes

[transcription of form]

Attachment O

UNDERWRITERS AT LLOYD'S, LONDON
VERIFICATION OF INSURANCE
THROUGH
ROLLINS BURDICK HUNTER OF ILLINOIS, INC.
123 NORTH WACKER DRIVE
CHICAGO, ILLINOIS 60606

In accordance with authorization granted to ROLLINS BURDICK OF ILLINOIS, INC., 123 North Wacker Drive, Chicago, Illinois 60606, by certain underwriters at LLOYD'S, LONDON (such Underwriters being hereinafter called "insurers"), the Insurers have issued to Nestle Transportation Company, 1327 Wall Street, Oconomowoc, Wisconsin 53066 Policy of Insurance No. 92NAP080 for a period of twelve calendar months beginning at 12:01 a.m. on the 1st day of July, 1992, and ending at 12:01 a.m. on the 1st day of July, 1993, Standard Time at place of issue, insuring said Assuried for Perils of "All Risk" of Direct Physical Loss.

The limits of liability contained in said Policy are as follows:

$1,000,000 Motor Truck Cargo each and every loss

. . . .

Verification for:

XXXX

[transcription of form]
[As far as possible, information filled in is provided.]

ACORD. CERTIFICATE OF INSURANCE 17651

Issue Date: 12/16/92

Producer:
Marsh & McLennan, Incorporated
3303 Wilshire Boulevard
Los Angeles, CA 90010

Companies Affording Coverage:
A Fidelity & Casualty Co of NY
B Continental Insurance Co.

Insured:
Nestle USA, Inc.
Nestle Transportation Company
1327 Wall Street
Oconomowoc, WI 53066

General Liability	Policy # SRL3641792	Limits
Commercial General		
Liability Occur.	effective 1/01/93 - 12/31/93	
	General Aggregate	10000000
	Products-Comp/op Agg.	Included
	Personal & Adv. Injury	2000000
	Each Occurrence	2000000
	Fire Damage (Any one fire)	2000000
	Med. Expense (Any one person)	
Automobile Liability	SRB1506906 1/01/93-12/31/93	
	SRB5074892 1/01/93-12/31/93	
	Combined single limit	2000000
Worker's Compensation & Employers' Liability	Statutory Limits	
	SRW3170005 1/01/93 - 12/31/93	
	SRW3170006 1/01/93 - 12/31/93	
	Each Accident	1000000
	Disease - Policy Limit	1000000
	Disease - Each Employee	1000000

CANCELLATION: Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will endeavor to mail 30 days written notice to the certificate holder named to the left, but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives.

[/s/ Authorized representative]

NESTLÉ USA, INC.

800 North Brand Blvd
Glendale CA 91203
Tel (818) 549-6000
Fax (818) 549-5840
Legal Department
Direct Line (818) 549-6220
October 29, 1992

Interstate Commerce Commission
12th and Constitution
Washington, D.C. 20013

Re: Compensated Intercorporate Hauling Notice

Gentlemen:

This is to provide notice pursuant to 49 U.S.C. 10524(b) that the following corporations intend to provide or use compensated intercorporate hauling operations as authorized by 49 U.S.C. 10524(b):

1. Parent corporation and address of principal office: Nestlé Holdings, Inc., c/o Nestlé USA, Inc., 800 N. Brand Blvd., Glendale, CA 91203.
2. Wholly-owned subsidiaries (and their respective divisions, if any) which will participate in the compensated intercorporate hauling operations:
   a) Nestlé Food Company, 800 N. Brand Boulevard, Glendale, CA 91203 (a Delaware corporation). Nestlé Food Company includes certain divisions which operate under the names of Nestlé Beich, Nestlé Chocolate & Confection Company, Nesté Distribution Company, Trenton Foods, and Contadina Foods.
   b) C. F. Services, Inc., 800 N. Brand Boulevard, Glendale, CA 91203 (a Delaware corporation).
   c) Fidco, Inc., 800 N. Brand Boulevard, Glendale, CA 91203 (a New York corporation).
   d) Friskies PetCare Company, 800 N. Brand Boulevard, Glendale, CA 91203 (a Delaware corporation).

e) Nestlé Brands Foodservice Company, 800 N. Brand Boulevard, Glendale, CA 91203 (a Delarare corporation).

f) Nesté Refrigerated Food Company, 800 N. Brand Boulevard, Glendale, CA 91203 (a Delaware corporation).

g) Nestlé Transportation Company, 800 N. Brand Boulevard, Glendale, CA 91203 (a Delaware corporation).

h) Superior Brands, Inc., 800 N. Brand Boulevard, Glendale, CA 91203 (a Massachusetts corporation).

i) Nestlé Beverage Company, 345 Spear Street, San Francisco, CA 94105 (a Delaware corporation).

j) Wine World Estates Company, 345 Spear Street, San Francisco, CA 94105 (a Delaware corporation).

k) Cain's Coffee Co., 13131 Broadway Extension, Oklahoma City, OK 73125 (a Delaware corporation).

l) Sunmark, Inc., 3660 Geyer Road, St. Louis, MO 63127 (a Missouri corporation).

m) Favorite Foods, Inc., 800 N. Brand Boulevard, Glendale, CA 91203 (a California corporation).

n) Nestlé Dairy Systems, Inc., 1740 Joyce Avenue, Columbus, OH 43219 (a Delaware corporation). Nestlé Dairy Systems, Inc. includes a division which operates under the name Nestlé Dairies.

o) Nestlé Frozen Food Company, 5750 Harper Road, Solon, OH 44139 (a Delaware corporation).

p) Stouffer Foods Corporation, 29800 Bainbridge Road, Solon, OH 44139 (a Pennsylvania corporation).

q) The . L. J. Minor Corporation, 30003 Bainbridge Road, Solon, OH 44139 (an Ohio corporation).

I affirm that Nestlé Holdings, Inc. is the parent corporation which directly or indirectly owns a 100% interest in the subsidiaries listed in this Notice which intend to participate in Compensated Intercorporate Hauling under 49 U.S.C. 10524(b).

I, Malcolm C. Ewing, Assistant Secretary of Nestlé Food Company, declare under penalty of perjury under the laws of the United States of America that to the best of my knowledge the foregoing is true and correct.

Executed on October 29, 1992.

/s/ M. C. Ewing
Malcolm C. Ewing
Assistant Secretary
Nestlé Food Company
on behalf of Nestlé Holdings, Inc., and its Subsidiaries.

[Transcription of Form]
[As far as possible, information filled in is provided.]

EMPLOYMENT ELIGIBILITY VERIFICATION (Form I-9)

Name: Manor, Paul E.
Address: 722 Marigold, Moses Lake WA 98837
Date of birth: 1-23-38 Soc. Security #: 537-34-4882
I attest, under penalty, that I am:
X 1. A citizen or national of the United States.
. . .
I attest, under penalty of perjury, the documents that I have presented as evidence of identity and employment eligibility are genuine and relate to me. . . .
/s/ Paul E. Manor Date: 12-12-01
. . .
List A: Documents that Establish Identity and Employment Eligibility
. . .
List B: Documents that Establish Identity:
X 1. A state-issued driver's license . . .
Document Identification: MANORPE626B3
Expiration Date (if any): 1-23-92
List C: Documents that Establish Employment Eligibility
X 1. Original Social Security Number Card . . .
Document Identification: # 537-34-4882
Expiration Date (if any):
. . .
CERTIFICATION: I attest, under penalty of perjury, that I have examined the documents presented by the above individual, that they appear to be genuine and to relate to the individual named, and that the individual, to the best of my knowledge, is eligible to work in the United States.
/s/ Del Gridley Name/Title: Del Gridley, Oper Supv
Employer Name: Carnaco Transport
Address: Moses Lake, WA
Date: 12-12-91

[transcription of form]
[this form has an ornate border]

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
For the Operation of Motor Propelled Vehicles
pursuant to the provisions of Chapter 81 RCW

THIS IS TO CERTIFY that authority is granted to operate as a MOTOR CARRIER in the transportation of the commodities and in the territory described herein to

CARNACO TRANSPORT INC
1327 WALL ST
OCONOMOWOC, WI 53066

PERMIT NO.
CN-001468
D-3

CORRECTED
L-D-E-1-3-5-6-8-17-CZ

Intrastate, irregular route, nonradial service as a carrier of General Freight in the Othello and Moses Lake Commercial Zones as defined in WAC 480-12-081.

Intrastate, irregular route, nonradial service as a carrier of General Freight in the State of Washington; Agricultural Commodities; Refrigerated Liquid and Solid Products; Heavy Machinery, Processed Foods; and Equipment and Supplies as utilized in plant, farm and storage facilities (local cartage) in the City of Moses Lake and in the State of Washington all under contract with NESTLE' FOOD COMPANY. Waiver of WAC 480-12-085 is granted to permit this carrier to transport its own commodities, materials, supplies and equipment in the State of Washington. 10-23-84
M. V. NO. 130800

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

[Washington state seal]

By [signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR & LYNETTE MANOR, husband and wife, Plaintiffs, vs. NESTLE FOOD COMPANY, Defendant.	No. 93-2-00044-1 DEFENDANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

On January 15, 1992, while in the course of his employment for Carnaco Transport, Inc., Mr. Manor's foot was run over by a forklift. He filed a workers' compensation claim by filing an Accident Report. A true and correct copy of the Accident Report is attached hereto, as Exhibit A. on February 14, 1992, the Washington State Department of Labor & Industries entered an Order allowing the claim against the self-insured employer, Nestle Food Company. A true and correct copy of that Order is attached hereto, as Exhibit B.

Carnaco Transport, Inc. is a wholly owned subsidiary of Nestle Food Company (formerly, Carnation Company), as showed by the Affidavit of Malcolm C. Ewing attached hereto, as Exhibit C. For the purposes of the Department of Labor & Industries, Mr. Manor's self-insured employer was and is Nestle Food Company, as shown by the Affidavit of Larry Wilkinson, attached hereto, as Exhibit D.

Mr. Manor's workers' compensation claim was allowed against Nestle Food Company and assigned Claim Number T-396715. Nestle Food Company has paid medical benefits under this claim in the amount of $437,187.02, and time-loss benefits in the amount of $18,646.66, all as shown by the Affidavit of Colleen Boyd attached hereto, as Exhibit E.

Although the workers' compensation claim was allowed against Nestle Food Company, and Nestle Food Company has paid benefits under that claim, Mr. Manor now seeks to sue Nestle Food Company, as a third party. This he cannot do.

The statute which governs this case is RCW 51.04.010 which provides, in relevant part, as follows:

> The state of Washington . . . declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers . . . is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided. (Emphasis supplied).

In Seattle-First v. Shoreline Concrete, 91 Wn.2d 230, 242, 588 P.2d 1308 (1978), the Supreme court described the effect of RCW 51.04.010 as follows:

> In effect, the Act "immunizes" from judicial jurisdiction, all tort actions which are premised upon the 'fault' of the employer vis-a-vis the employee. The determination to abolish judicial jurisdiction over such "immunized" conduct was a legislative policy decision. The wisdom of that decision is not a proper subject of our review.

In Wolfe v. Scott Wetzel Services, 113 Wn.2d 665, 782 P.2d 203 (1989), the Supreme Court held that the employer's immunity extends to a company hired by the employer to administer workers' compensation claims.

In Corr v. Willamette Industries, 105 Wn.2d 217, 713 P.2d 92 (1986), Willamette Industries absorbed Corco in a corporate merger. Subsequently, an employee of Western Kraft Paper Group, a wholly owned subsidiary of Willamette, was injured by one of the bulk bin compressor units Willamette

Industries had acquired from Corco in the merger. The court held that the Workers' Compensation Act provided the exclusive remedy for an employee injured by defective equipment designed and built by his employer's corporate predecessor unless the employer had expressly waived the Act's protection. Therefore, both Willamette Industries and its wholly owned subsidiary, Western Kraft Paper Group, were immune from suit.

The fallacy of Mr. Manor's argument, that Nestle Food Company is not immune to suit, is shown by reference to Chapter 51.24 RCW. That chapter allows actions to be brought against third parties, "not in a worker's same employ". RCW 51.24.030(1). When such an action, is brought, the self-insured employer must be notified pursuant to RCW 51.24.030(2) and RCW 51.24.080.

If the amount offered to settle the case is less than the benefits which are paid and payable under Title 51 RCW, then the settlement cannot be entered without the approval of the self-insured employer, pursuant to RCW 51.24.090.

Here, Mr. Manor would have Nestle Food Company approve a settlement against Nestle Food Company. The illogic of this position is manifest.

Clearly Nestle Food Company is immune from suit. That immunity also extends to Mrs. Manor's loss of consortium claim. Provost v. Puget Power, 103 Wn.2d 750, 696, P.2d 1238 (1985).

Meads v. VFW Post 969, 54 Wn.App. 486, 774, P.2d 49 (1989), does not avoid the immunity. First, this case was wrongly decided. Even if the case is given some value, it certainly does not extend to this case, where Mr. Manor is attempting to sue the very self-insured employer against which his claim was allowed and which has been paying him workers' compensation benefits.

The defendant being immune from suit, this action must be dismissed.

DATED this 26th day of August, 1993.

/s/ Wayne L. Williams
Attorney at Law, WSBA #4145

[NOTE: 10 copies of page, 8-1/2" x 11", lodged]

[See Page A-127]

[transcription of form]

[As far as possible, information filled in is provided.]

[Not possible to reproduce printing on form in size required.]

[WASHINGTON STATE SEAL] SELF INSURER ACCIDENT REPORT

WORKER START HERE (SIF-2) T 396715

ALL questions below must be answered . . .

. . . U.B.I # 409 000 899 CLASS 402

. . . Paul E. Manor 765 9004

. . . 722 Marigold 587-34-4882

. . . Moses Lake WA 98837 765-9441

...6'3" 260 Lynette K. Manor Truck Driver M 1-23-38

Crushed foot Left foot 1/15/92 9:30 a.m.

Standing on dock waiting to load. Left foot was run over by a forklift.

CSLTOor Fred Garcia(?) Carnaco Transport, Moses Lake WA

1-15-92 16 yrs yes other

Yes Carnation Co., Othello WA Adams

Del Gridley, Supervisor 1/15/92

No No

Dr. Brown, 660 Coolidge Dr. #105, Moses Lake WA 1-16-92

Samaritan Hosp /s/ Paul E. Manor

Moses Lake /s/ Paul E. Manor

EMPLOYER START HERE

Yes 6:00 am - 5:00 pm No

5 No No $ 8.50 hour

Yes [Scott Wetzel Svc Received stamp dtd Jan 30, 1992]

No 1-15-92

I DECLARE . . . FOREGOING STATEMENTS TRUE . . .

1/20/92 /s/ Kenneth S. Mesein(?), Terminal manager

Carnation Transport

11958 Wheeler Road Moses Lake WA 98827

PRVDR HUTCHISON JIM L MD
FOURTEENTH AVE MED CTR
475 N 14TH AVE
OTHELLO WA 99544

STATE OF WASHINGTON
DEPT. OF LABOR AND INDUSTRIES
DIVISION OF INDUSTRIAL INSURANCE
OLYMPIA, WA. 98504
SELF INSURED

EMP NESTLE FOOD COMPANY CLAIM ID : T396715 TYPE : AS
C/O SCOTT WETZEL SVC INC
35801 1ST WAY S STE 301 MAILING DATE 02-14-92 WRKPOS : SI 72
PO BOX 9706
FEDERAL WAY WA 99063-9706 INJURY DATE 01-15-92 UNIT : S
CLMT PAUL E MANOR SERVICE LOCATION : EPHRATA
722 MARIGOLD UBI : 409 000 899
MOSES LAKE WA 99837 ACCOUNT ID : 700,247-00
CLASS : 4002
WORK LOCATION ADDRESS:
NESTLE FOOD COMPANY
11958 WHEELER ROAD
MOSES LAKE WA 98837

NOTICE OF DECISION

THE CLAIMANT NAMED HEREIN HAS FILED A CLAIM FOR WORKERS' COMPENSATION BENEFITS WITH THE SELF-INSURED EMPLOYER NAMED HEREIN. THE DEPARTMENT OF LABOR AND INDUSTRIES HAS BEEN REQUESTED TO ISSUE A DETERMINATIVE ORDER. THE DEPARTMENT'S ORDER IS SET FORTH AT THE BOTTOM OF THIS PAGE. ANY PROTEST OR REQUEST FOR RECONSIDERATION ON THIS ORDER MUST BE MADE IN WRITING TO THE DEPARTMENT OF LABOR AND INDUSTRIES IN OLYMPIA WITHIN 10 DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A REQUEST. ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN 60 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES, OR THE SAME SHALL BECOME FINAL.

WHEREAS, THE ABOVE NAMED WORKER SUSTAINED AN INJURY WHILE IN THE COURSE OF EMPLOYMENT WITH A SELF-INSURED EMPLOYER, AND

WHEREAS, PAYMENT OF TIME LOSS COMPENSATION BY THE SELF-INSURED EMPLOYER HAS BEEN REPORTED IN ACCORDANCE WITH WAC 296-15-070;

IT IS HEREBY ORDERED THAT THIS CLAIM BE ALLOWED FOR MEDICAL TREATMENT AND SUCH OTHER BENEFITS AS MAY BE AUTHORIZED OR REQUIRED BY LAW.

THIS IS A FORMAL ORDER TO THE EFFECT.

SUPERVISOR OF INDUSTRIAL INSURANCE
BY TINA GOFORTH
CLAIMS REP, SELF INS

FILE COPY

A-180

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No. 93-2-00044-1
vs.	)	AFFIDAVIT OF
NESTLE FOOD COMPANY, Defendant.	)	MALCOLM C. EWING

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Malcolm C. Ewing, being first duly sworn on oath, does depose and state:

1. That I am the Assistant Corporate Secretary of Nestle Food Company (formerly Carnation Company). As such, I am familiar with and competent to testify about the corporate structure of Carnation Company and the relationship between Carnation Company and its subsidiaries. I have responsibility for Nestle Food Company and its subsidiary companies' corporate books.

2. That on June 4, 1991, Carnation Company filed a Restated Certificate of Incorporation, renaming it Nestle Food Company. A copy of this Restated Certificate is attached as Exhibit A to this Affidavit.

3. Prior to, on, and after August 2, 1989, Carnaco Transport, Inc. was a wholly-owned subsidiary of Carnation Company.

DATED this 7th day of July,1993.

/s/ Malcolm C. Ewing

Subscribed and sworn to before me this 7th day of July, 1993.

/s/ Suzanna E. Arady
Notary Public in and for the
State of California. My
commission expires 7/26/96.

[notary seal, Suzanna E. Arady]

Exhibit C

State of Delaware

[Delaware Coat of Arms Symbol]

Office of Secretary of State

I , MICHAEL HARKINS, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF INCORPORATION OF CARNATION COMPANY FILED IN THIS OFFICE ON THE FOURTH DAY OF JUNE, A.D. 1991, AT 10 O'CLOCK A.M.

* * * * * * * * * * *

[stamp "Received for Record NCCO"
91 JUN-7 A 10:23.0]

/s/ Michael Harkins
Michael Harkins Secretary of State

[Delaware State Seal]
721155087

Authentication: *3068009

Date: 06/04/1991

STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 10:00 AM 06/04/1991
821155087 - 103416

RESTATED CERTIFICATE OF INCORPORATION OF CARNATION COMPANY

CARNATION COMPANY (the "Corporation"), a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware, hereby adopts the following Restated Certificate of Incorporation pursuant to Sections 242 and 245 of said General Corporation Law:

1. The name of the Corporation is: CARNATION COMPANY
2. The Certificate of Incorporation of the Corporation was originally filed with the Secretary of State of the State of Delaware on May 21, 1920.
3. The Restated Certificate of Incorporation was duly adopted by the unanimous written consent of the Board of Directors of the Corporation as of May 1, 1991 and by the unanimous written consent of the sole stockholder of the Corporation as of May 1, 1991 in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.
4. The Restated Certificate of Incorporation supersedes the original Certificate of Incorporation and any previous Restated Certificate of Incorporation.
5. The Certificate of Incorporation is hereby amended in its entirety to read as follows:

I. NAME

The name of the Corporation is Nestle Food Company (the "Corporation").

II. PURPOSE

The nature of the business or purposes to be conducted or promoted are to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware.

III. AGENT FOR SERVICE OF PROCESS

The address of its registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, county of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

IV. STOCK

The Corporation is authorized to issue one class of shares, which shall be designated "Common Stock". The total number of Common Stock authorized is One Thousand (1,000) shares, with a par value of One Dollar ($1.00) per share.

V. DIRECTOR LIABILITY

To the fullest extent permitted by Delaware statutory or decisional law, as the same may be amended or interpreted, a director of the Corporation shall not be personally liable to the Corporation or its stockholder for money damages for breach of fiduciary duty as a director; provided, that nothing contained in this Article shall create or limit the liability of any director (i) for any breach of the director's duty of loyalty to the Corporation or its stockholder, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, (iii) under Section 174 of the General Corporation Law of the State of Delaware, or (iv) for any transaction from which the director derived an improper personal benefit. If the General Corporation Law of the State of Delaware is hereafter amended to authorize, with approval of a corporation's stockholders, further reductions in the liability of the Corporation's directors for breach of fiduciary duty, then a director of the Corporation shall not be liable for any such breach to the fullest extent permitted by the General Corporation Law of the State of Delaware as so amended.

Any repeal or modification of the foregoing provisions of Article V by the stockholder of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

Notwithstanding anything else in this Article V, at any and all times at which the Corporation is subject to the provisions of the California Corporation Code by virtue of the operation of section 2115 thereof or otherwise, then this Article V shall be in all respects limited by the provisions of the California Corporations Code made applicable by such Section 2115 (or such other provision of California law). Further, in the event that California law is determinative of the matters discussed in this Article V, the liability of the directors of the Corporation for monetary damages shall be limited to the fullest extent permissible under California law and consistent with Delaware law. Further, the Corporation may provide for indemnification for officers and directors in excess of that expressly permitted under California law so long as such indemnification is not expressly prohibited under Section 204 of the California Corporations Code or the General Corporation Law of the State of Delaware.

VI. MANAGEMENT

The following provisions are asserted for the management of the business and for the conduct of the affairs of the Corporation and for the purpose of creating, defining, ting and regulating the powers of the Corporation and its directors and stockholder (references herein to the singular shall be deemed to refer to the plural as is appropriate):

. . . .

BEFORE THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No. 93-2-00044-1
vs.	)	AFFIDAVIT OF
NESTLE FOOD COMPANY, Defendant.	)	LARRY WILKINSON
STATE OF WASHINGTON COUNTY OF THURSTON	)	

Larry Wilkinson, being first duly sworn on oath, does depose and state:

1. That I am employed as a Senior Surety Analyst for the Washington State Department of Labor and Industries, Self-Insurance Section. In that capacity, I am familiar with the self-insurance certification of employers in this state. I have reviewed the files of the Department of Labor and Industries, which show that Nestle Food Company is a registered self-insured employer in the State of Washington with a self-insurance account identification number of 700,247. Carnaco Transport is a subsidiary of Nestle Food Company, and for Department of Labor and Industries purposes its employees are employees of Nestle Food Company and receive workers' compensation benefits from Nestle Food Company under its registration as a self-insured employer in the State of Washington.

2. Carnaco is not independently certified or registered as a self-insured employer.

DATED this 13th day of July, 1993.

/s/ Larry Wilkinson

Subscribed and sworn to before me this 13th day of July, 1993.

/s/ Janete Nieman

[notary seal of Janete C. Nieman] NOTARY PUBLIC in and for the State of Washington. My commission expires 11/30/96.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR & LYNETTE MANOR, husband and wife, Plaintiffs,	No. 93-2-00044-1
vs.	AFFIDAVIT OF COLLEEN BOYD
NESTLE FOOD COMPANY, Defendant.	

STATE OF WASHINGTON)
: ss.
COUNTY OF KING)

Colleen Boyd, being first duly sworn on oath does depose and state:

1. That I am employed by Scott Wetzel Services, which, in turn, is employed as a service company of the self-insured employer, Nestle Food Company. Scott Wetzel Services acts as the agent of Nestle Food Company administering workers' compensation claims by employees of Nestle Food Company and its subsidiaries in the State of Washington.

2. That the claim of Paul Manor, Claim Number T-396715, was for his injury of his left foot, while employed by Carnaco Transport. The claim was allowed against the self-insured employer, Nestle Food Company. No appeal or protest was taken from employer, Nestle Food Company. No appeal or protest was taken from that determination and it has become final.

3. That Nestle Food Company has paid all workers' compensation benefits to the claimant, Paul Manor, under claim number T-396715.

ROLLAND, O'MALLEY, WILLIAMS
& WYCKOFF, P.S.
P O Box 316, Olympia WA 98507

4. That Nestle Food Company has paid medical benefits pursuant to Title 51 RCW in the amount of $437,187.02, and has paid time loss benefits in the amount of $18,646.66, to date.

DATED this 17th day of August, 1992.

/s/ Colleen Boyd

Subscribed and sworn to before me this 17 day of August, 1992.

/s/ Patricia J. Firth
Notary Public in and for the State of Washington. My commission expires 8/29/96.

[Notary seal of Patricia J. Firth]

SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Plaintiffs,	)	No.
vs.	)	COMPLAINT FOR
NESTLE FOOD COMPANY, Defendant.	)	PERSONAL INJURIES

COME NOW THE PLAINTIFFS, by their attorney John Luke McKean, and state as follows:

I. PARTIES, JURISDICTION AND VENUE

1.1. Plaintiffs are husband and wife and reside in Grant County, Washington.

1.2. Defendant Nestle Food Company is a Delaware corporation licensed and doing business in the State of Washington.

1.3. Defendant owns and operates the Carnation Processed Potato Plant in Othello, Washington where the injury occurred which caused Plaintiffs' losses.

1.4. All acts and omissions alleged herein occurred in Adams County, Washington. Jurisdiction and venue is properly in Adams County.

II. CLAIM

2.1. On or about January 15, 1992 at the Carnation Processed Potato Plant at 1200 N. Broadway in Othello, Washington, Paul E. Manor's foot was driven over by a forklift owned by Defendant and operated by Jim Talbot. Jim Talbot was at all times material an employee of Defendant acting within the scope of his employment.

2.2 Plaintiff was injured because of the negligence of the Defendant and its employee. Defendant is liable to Plaintiffs for its own negligence. Defendant is liable to Plaintiffs for the negligence of its employee under the principle of Respondeat Superior.

2.3. As a result of the negligence of Defendant and its

employee, Plaintiff Paul Manor was injured, suffered and continues to suffer physical disability and pain, emotional trauma, medical expenses, loss of earnings and earning capacity and other damages.

2.4. As a result of the negligence of Defendant and its employee, Plaintiff Lynette Manor was injured, suffered and continues to suffer loss of consortium and enjoyment of life on account of the injuries to her husband.

2.5. Plaintiffs hereby waive the physician-patient privilege ONLY to the extent required by RCW 5.60.060, as limited by the Plaintiff's constitutional rights of privacy, contractual rights of privacy, and the ethical obligation of physician's and attorneys not to engage in ex parte contact between a treating physician and the patient's legal adversaries.

III. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against defendant in an amount that will compensate plaintiffs for all damages sustained, including:

a. Past and future medical expenses and other health care expenses.
b. Past and future loss of earnings.
c. Pain and suffering, both mental and physical.
d. Past and future disability and disfigurement.
e. Loss of enjoyment of life and for reduction of life expectancy.
f. Past and future special damages.
g. Loss of consortium.
h. Interest calculated at the maximum amount allowable by law, including prejudgment interest.
i. Plaintiffs' costs and disbursements and statutory attorney fees.

DATED this 22 day of March, 1993.

McKean Law Office
/s/ John Luke McKean
Attorney for Plaintiffs, WSBA #13294

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

PAUL E. MANOR & LYNETTE MANOR, husband and wife, Plaintiffs, vs. NESTLE FOOD COMPANY, Defendant.	No. 93-2-00044-1 MOTION TO DISMISS

COMES NOW the Defendant, Nestle Food Company, by and through its attorneys, Rolland, O'Malley & Williams, P.S., per Wayne L. Williams, and hereby moves to dismiss this action for lack of subject matter jurisdiction.

This motion is supported by the Memorandum of Authorities, submitted herewith.

DATED this 26th day of August, 1993.

ROLLAND, O'MALLEY & WILLIAMS, P.S.
/s/ Wayne L. Williams
Wayne L.Williams, WSBA# 4145
Attorney for Defendant

ROLLAND, O'MALLEY, WILLIAMS & WYCKOFF, P.S.
P. O. Box 316, Olympia, Washington 98507
Telephone (206) 352-9331

SUPREME COURT OF THE STATE OF WASHINGTON

[File Stamp]
Supreme Court
State of Washington
97 Apr 11 PM 2:25
By C. J. Merritt, Clerk

PAUL E. MANOR and LYNETTE MANOR, husband and wife, Respondents,	)	No. 63133-6
V.	)	MOTION FOR LEAVE TO FILE AMICUS BRIEF, RAP 13.4
NESTLE FOOD COMPANY, Petitioner.	)	

1 IDENTITY OF MOVING PARTY

CONNIE JUNE MILLER, on behalf of herself and workers in Washington State in local unions within the AFL/CIO, petitions this Court for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Allow petitioner to file Amicus Brief on the constitutionality of the judicially legislated expansion of the beneficiaries of RCW 51 immunity without commensurate expansion of the benefits to the worker.

3. FACTS RELEVANT TO MOTION

Justices Durham, Dolliver, Smith, Guy, Johnson and Talmadge issued an opinion on 13 March 1997 in this case which upset the constitutional balance of the Industrial Insurance Program in the State of Washington by adding parent corporations to the beneficiary of immunity of RCW 51.

Petitioner Connie Miller was kidnapped, raped, and shot in the head in the scope of her employment with Prestige Stations, Inc., a subsidiary of Atlantic Richfield Company, a Delaware corporation. Petitioner's claims against Atlantic Richfield Company and ARCO Petroleum Products Co., another subsidiary corporation of Atlantic Richfield Company, are pending in the United States District Court for the Western District of Washington at Tacoma, Cause Number C96-5989 RJB. Further, petitioner's counsel is an attorney for the

AFL/CIO Union Privileges Plan for union workers in the Puget Sound Area, and this issue directly affects the tens of thousands of union members in Washington State. Petitioner and her counsel did not become aware of this Court's ruling until 18 March 1997.

4. GROUNDS FOR RELIEF AND ARGUMENT

The basis for upholding Industrial Insurance a/k/a Workmen's Compensation Programs against challenge for violation of substantive and due process rights, under the 14th Amendment to the Constitution of the United States, is that they provide a *quid pro quo* to the workman and the employer, i.e., a guarantee of limited compensation in exchange for giving up the right to sue co-employees and the worker's employer (Northern Pacific Rail Co. v. Meese (1915), 36 S.Ct. 223, 239 U.S. 614, 60 L.Ed.2d 467; New York Central R. Co. v. White (NY, 1917), 37 S.Ct. 247, 243 U.S. 188, 61 L.Ed 667; Mountain Timber Co. v. Washington (Wash., 1917), 75 Wash. 581, 135 P. 685, affirmed 37 S.Ct. 260, 243 U.S. 219, 61 L.Ed 685).

The judicially legislated expansion of the immunity of Title 51 RCW tips the balance so far away from the worker that the Industrial Insurance Program of the State of Washington loses its *quid pro quo* and, thus, its protection from constitutional challenge. The extension of the immunity of RCW 51 is not required in order to meet the stated objective of not allowing a parent corporation to split work among subsidiaries and then self-insure some while putting others into the state insurance fund. Thus, there is no reasonable State purpose therefor (Marshal v. Mahony (1932), 56 F.2d 74), and the Act should not be amended by judicial construction on an attenuated theory of inclusion (Kirk v. Dept. of Labor & Industries (1937), 192 Wash. 671, 74 P.2d 227).

The effect of this Court's decision, if let stand, is to greatly expand the *quo*, immunity, with no commensurate expansion of the *quid*, compensation to the worker, and makes Title 51 RCW unconstitutional (Sunsgan Engineering & Const. Co. v. Spring-Lock Scaffolding Co. (Fla.,1975, 310 So.2d 4).

Justice Talmadge has effectively persuaded justices Dolliver, Smith, and Johnson to reject their position that "All doubts as to the meaning of the Act are to be resolved in favor of the injured worker." (Clauson v. Dept. of Labor & Industries (Wash., 1996), 925 P.2d 624 at 626).

This is such a significant blow to workmen in Washington State that this Court should allow petitioner to file an Amicus Brief in support of reconsideration of this Court's ruling.

RESPECTFULLY SUBMITTED this 9th day of April, 1997.

/s/ James F. Leggett
James F. Leggett, WSBA 6630
Attorney for Petitioner
Connie June Miller

LEGGETT & KRAM
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